139-67

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 170.

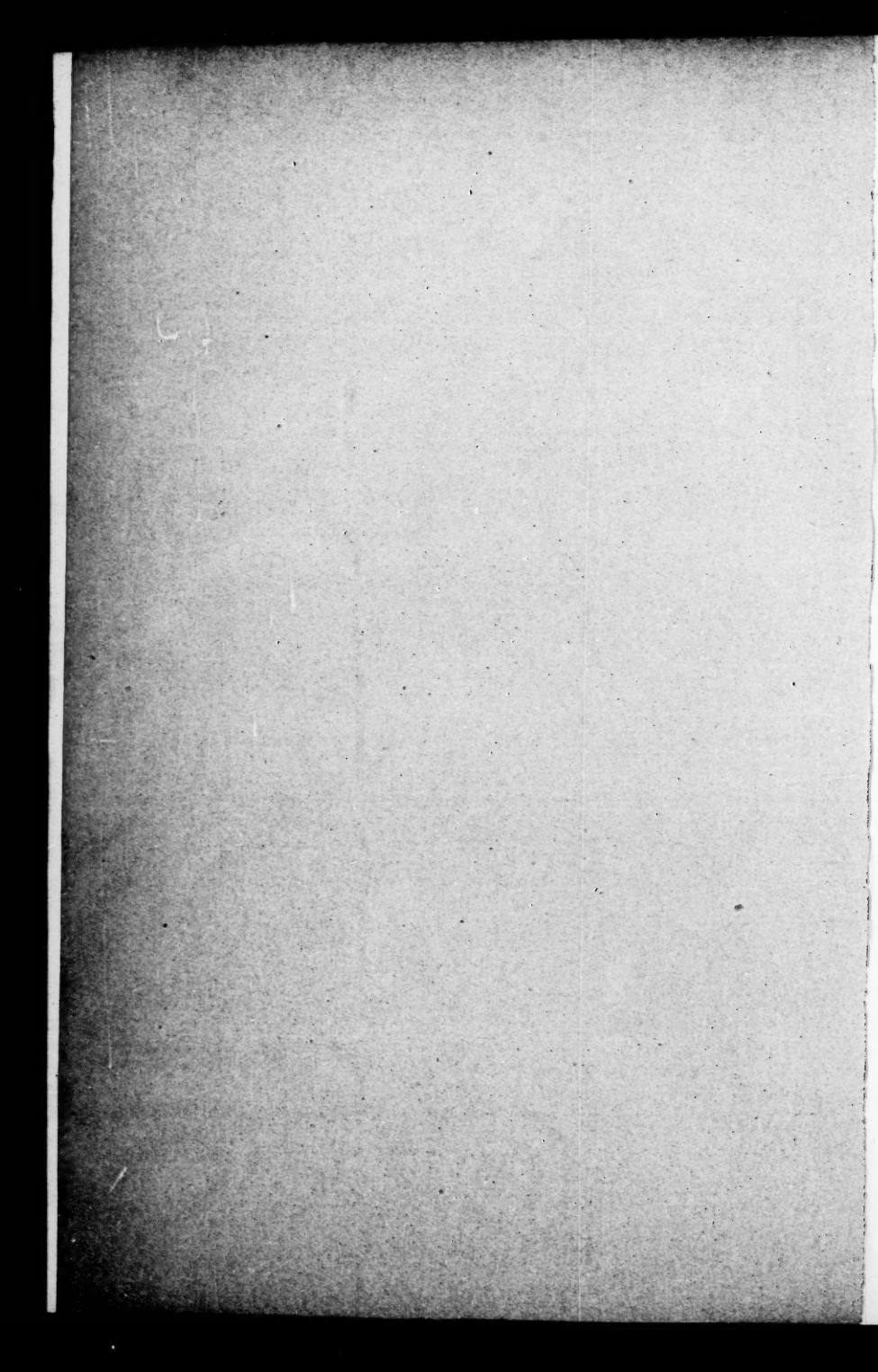
THE LOGAN COUNTY NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

R. P. TOWNSEND.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED OCTOBER 10, 1887.



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1 Supreme Court of the United States.

THE LOGAN COUNTY NATIONAL BANK, Plaintiff in Error,
vs.
R. P. TOWNSEND, Defendant in Error.
} Assignment of Errors.

The Logan County National Bank, the plaintiff in error herein, makes and submits the following assignment of errors in the above-entitled cause, to wit:

First. The plaintiff in error assigns as error and complains that the court of appeals of Kentucky erred to the prejudice of the plaintiff in error in directing and adjudging that the judgment rendered by the Logan circuit court in the action of R. P. Townsend, the defendant in error, *vs.* The Logan County National Bank, the plaintiff in error, should be affirmed, and directing said cause to be remanded to said Logan circuit court, with directions to enter judgment and award a writ of execution in favor of said R. P. Townsend, defendant in error, and against said Logan County National Bank, plaintiff in error, for the amount of the demand sued on, with damages and costs. The said erroneous and prejudicial judgment of the said court of appeals of Kentucky will be found on pages 114 & 115 of this record, immediately preceding said court of appeals' opinion as delivered by Judge Lewis, which is copied in the record as a part thereof, and which said judgment and opinion were rendered and delivered by said court of appeals on the 10th day of February, A. D. 1887. The said judgment of said court of appeals is erroneous because it deprives the plaintiff in error of the benefit and pro-

2 tection given it by the terms and provisions of the act of the Congress of the United States entitled "the national bank act," approved June 3, 1864, which said act of Congress is the charter of said plaintiff in error. Said judgment of said court of appeals is erroneous because it holds and decides, to the great prejudice of the plaintiff in error, which is a banking corporation organized and existing under said act of Congress, that the alleged contract or agreement sued on in the said Logan circuit court by said defendant in error was within the scope of the power and authority of the cashier of said plaintiff in error; that said cashier was empowered by virtue of his office as cashier of said national bank to bind the plaintiff in error by the making of said alleged contract or agreement with the defendant in error. The plaintiff in error insisted in the said Logan circuit court and in the said court of appeals and still insists and maintains that said alleged contract was not within the scope of the cashier's powers, and for that reason is not binding on said bank. The terms of said alleged contract are that said cashier agreed to buy and did buy from the defendant in error $12,800 of the bonds of Logan county, Kentucky, issued to aid the building and in payment of said county's subscription to the capital stock of a railroad through said county, at the price of 68½ cents on the dollar, and agreed to replace said bonds or bonds of like character to defendant

in error at any time in future, on his demand, at the same price or at a lower price.

Second. It was error to the prejudice of the plaintiff in error in in the judgment of said court of appeals of Kentucky to de-
3 clare and adjudge that the general demurrer filed by the plaintiff in error in said Logan circuit court to the petition (declaration) of the defendant in error should have been and was properly overruled by said Logan circuit court, and it was error to the prejudice of the plaintiff in error in said judgment of said court of appeals to hold and decide that the judgment of the said Logan circuit court in overruling said demurrer to said petition must be affirmed. The plaintiff in error maintained in said Logan circuit court and maintained in said court of appeals and now insists and maintains that the cause of action as set out in said petition against the said National Bank, plaintiff in error, was and is founded upon an agreement forbidden by the terms and provisions of the charter of the plaintiff in error—the act of Congress aforesaid; that it was a mere gambling transaction and one of the practices unauthorized and prohibited by the said "national bank act," and in overruling said demurrer to said petition said Logan circuit court erred to the prejudice of the plaintiff in error, and in affirming and giving effect and force to said judgment said court of appeals erred to the prejudice of the plaintiff in error.

Third. It was error to the prejudice of the plaintiff in error in the judgment of the said court of appeals to affirm the judgment of the said Logan circuit court in overruling the plaintiff in error's motion for a peremptory instruction directing the jury to find and return a verdict, as in case of a nonsuit, for the plaintiff in error, which motion was made by the plaintiff in error, on the trial of the cause in the said Logan circuit court, at the conclusion of the evidence introduced
4 by and on behalf of the defendant in error. Said motion ought to have been sustained by the said Logan circuit court for the reason that the evidence introduced by the plaintiff showed that the contract upon which he based his action was made solely with the cashier of the plaintiff in error, and that the said cashier had no power to make such a contract, and that said plaintiff in error, being a banking corporation, was forbidden by said "national bank act" to enter into or make any such contract. It was error to the prejudice of the plaintiff in error in the judgment of the court of appeals aforesaid to affirm the judgment of said circuit court in overruling said motion for a peremptory instruction, as stated.

Fourth. It was error to the prejudice of the plaintiff in error in the judgment of the court of appeals aforesaid to affirm said Logan circuit court's judgment in overruling plaintiff in error's said general demurrer to said petition and in overruling plaintiff in error's said motion for said peremptory instruction, as hereinbefore set out, because both said petition and the evidence introduced on behalf of said defendant in error on said trial in said Logan circuit court showed that the alleged contract sued on was without sufficient or any consideration and was, furthermore, void and unenforceable for want of mutuality.

Fifth. It was error to the prejudice of the plaintiff in error in the judgment of the said court of appeals to affirm the judgment of the said Logan circuit court in refusing to charge or instruct the jury on the trial as prayed for at the time by the plaintiff in error
5 in "instructons" No. 9, No. 12, No. 13, all of which are copied into the record and may be found — No. 9 on page 94, No. 12 on page —, and No. 13 on page —. All of said three instructions were asked for by the plaintiff in error on the trial before the jury in the Logan circuit court, but that court refused to give any of said instructions and refused to charge or instruct the jury substantially as so requested, and the plaintiff in error assigns as an error prejudicial to it the judgment of the court of appeals affirming the said Logan circuit court's judgment in refusing to so instruct or charge the jury.

Sixth. It was error to give the instructions asked for by the defendant in error on the trial of the cause in the said Logan circuit court, to the giving of all of which plaintiff in error at the time objected. Said instructions are all copied into the record and may be found on pages —. It was error to the prejudice of the plaintiff in error in the judgment of the said court of appeals to affirm the judgment of the Logan circuit court giving said instructions over the objections of the plaintiff in error. Said instructions do not contain the law of the case.

Seventh. It was error to the prejudice of the plaintiff in the judgment of said court of appeals to affirm the judgment of the said Logan circuit court in sustaining defendant in error's demurrer to the 5th paragraph of the plaintiff in error's answer, which paragraph sets out the alleged contract and avers (1) that the cashier had no power to make it, and (2) that the bank had no power to make it.

6 Eighth. It was error to the prejudice of the plaintiff in error in the judgment of said court of appeals to declare, affirm, and adjudge that the plaintiff in error, a national banking corporation, organized under the "national bank act," has the power under the said charter to traffic and deal in county subsidy bonds, and to decide that the plaintiff in error is bound to answer in damages amounting to the difference between the value of $12,800.00 of county railway bonds at 68½ cents on the dollar and their value at par, to wit, $4,030.00 (the court's computation), because a cashier of the plaintiff in error and the defendant in error claim to have made the extraordinary contract mentioned, by which the cashier took the defendant in error's bonds and paid him 68½ cents for them, their full market value at the time, and agreed to let him have similar bonds at any time thereafter, on his demand, at the same price or at a lower price.

Ninth. It was error to the prejudice of the plaintiff in error in the judgment of the court of appeals of Kentucky to hold and adjudge the Logan circuit court had the right and power under the law to assess the amount of recovery when the jury failed to do so. It was error to the prejudice of the plaintiff in error in the judgment of the court of appeals to hold and decide the judgment of

the Logan circuit court overruling plaintiff in error's motion for a new trial was correct and should be affirmed, and that the verdict of the jury was sustained by the evidence.

Wherefore the plaintiff in error, the said Logan County National Bank, prays the Supreme Court of the United States to reverse the said judgment of the court of appeals of Keutucky and to
7 set aside and vacate the said judgment of said Logan circuit court and remand this cause to said court of appeals with directions to issue its mandate directing said Logan circuit court to dismiss the defendant in error's petition, and for all appropriate relief.

WILBUR F. BROWDER,
Of Counsel for the Plaintiff in Error.

WILBUR F. BROWDER,
GEORGE B. EDWARDS, *Counsel.*

1887, June 16.—Filed in clerk's office.
Att.: T. J. HENRY, *Clk.*

Supplemental Assig-ment — Errors.

Kentucky Court of Appeals.

THE LOGAN COUNTY NATIONAL BANK, Plaintiff in Error, *vs.* R. P. TOWNSEND, Defendant in Error. } Supplemental Assignment of Errors.

The Logan County National Bank, plaintiff in error herein, now comes and says that since the filing of its original assignment of errors in this cause, on the 16th day of June, 1887, it filed in the office of the clerk of the court of appeals of Kentucky a petition for rehearing, as provided by the laws of Kentucky, wherein it stated the grounds upon which it moved the said appellate court to set aside the judgment rendered herein on the 10th day of February, 1887, and to grant it a new trial or rehearing of said cause, and that said petition for rehearing came on for trial and consideration in and before said court of appeals on the 16th day of June, 1887, and that said court, by its decision and judgment, that day rendered and entered of record, overruled said petition and refused to grant the plaintiff in error a new trial of the cause.

8 Plaintiff in error assigns as error the decision and judgment of the court of appeals aforesaid overruling said petition for rehearing, and complains that by said decision and judgment, which was erroneous and in violation of its rights as secured to it under the act of Congress specifically relied on and cited in its original assignment of errors, the plaintiff in error was and is greatly damaged, and it prays for a reversal of said judgment and as formerly, &c.

July 21, 1887.

LOGAN COUNTY NATIONAL BANK,
Plaintiff in Error,
By WILBUR F. BROWDER, *Attorney.*

1887, July 23.—Filed.

8a UNITED STATES OF AMERICA, *ss:*

Court of Appeals of Kentucky.

To R. P. Townsend, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington on the 10th day of October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of Kentucky, wherein The Logan County National Bank is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Wm. S. Pryor, chief justice of the court of appeals of Ky., this 23rd day of February, in the year of Lord 1887, and of our Independence the 111th.

WILL. S. PRYOR,
Chief Justice of Ky.

8b Executed on the within R. P. Townsend by delivering to him a true copy of this citation this the 25th day of February, A. D. 1887.

J. R. PERRY,
Sheriff, Logan County, Ky.

Subscribed and sworn to before me by J. R. Perry, sheriff of Logan county, Kentucky, this the 25th day of February, A. D. 1887.

[Seal of A. G. Rhea, Notary Public, Logan County, Ky.]

A. G. RHEA,
N. P., L. C., Ky.

My fee for executing this writ, $2.00, and notary's fee for certificate, 50 cents, $2.50, paid by pl'ff in error.

Feb'y 25, 1887.

J. R. PERRY, *S. L. C.*

8c UNITED STATES OF AMERICA, *District of Kentucky,* } *ss:*

The President of the United States of America to the judges of the court of appeals of Kentucky, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said court of appeals of Kentucky, before you, between The Logan County National Bank, plaintiff, and R. P. Townsend, defendant, a manifest error hath happened, to the great damage of the said Logan County National Bank, as by its complaint appears, and, it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme

Court of the United States, together with this writ, so that you have the same at the city of Washington on the first day of the next October term, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Louisville, in said district, this 22nd day of February, A. D. 1887, and of the Independence of the United States the 111th.

[Seal Circuit Court, Ky. Dis., U. S. of America.]

SAM'L B. CRAIL,
C. C. C., K. D.

Allowed by—
WILL. S. PRYOR,
Chief Justice Court of Appeals of Kentucky.

9 On the second day of March, 1887, the appellant, The Logan County National Bank, filed in the clerk's office of the court of appeals of Kentucky the following supersedeas bond:

LOGAN COUNTY NATIONAL BANK
vs.
R. P. TOWNSEND.

Know all men by these presents that we, The Logan County National Bank, principal, and W. F. Barclay, C. H. Ryan, W. F. Browder, J. C. Barclay, Wm. Bryan, sureties, are held and firmly bound unto R. P. Townsend in the sum of fifty-one hundred and seventy-eight and $\frac{55}{100}$ dollars, to be paid to the said R. P. Townsend, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 2nd day of March, A. D. 1887.

Whereas the above-named Logan County National Bank hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the court of appeals of Kentucky:

Now, therefore, the condition of this obligation is such that if the above-named Logan County National Bank shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

10 W. F. BARCLAY, [L. S.]
C. H. RYAN, [L. S.]
WILBUR F. BROWDER, [L. S.]
J. C. BARCLAY, [L. S.]
WM. BRYAN, [L. S.]
By SAM. M. GAINES,
Attorney-in-Fact.

Sealed and delivered in presence of and bond approved by—
WILL. S. PRYOR,
Chief Justice Ky. Court of Appeals.

Judgment circuit court, rendered Jan. 29, 1884	$4,030 00
6% int. from Jan'y 29, '84, to M'ch 2, 1887	745 55
10% per cent. damages on $4,030.00	403 00
Amount of supersedeas bond	$5,178 55

Court of Appeals of Kentucky.

LOGAN COUNTY NATIONAL BANK, Plaintiff in Error, *against* R. P. TOWNSEND, Defendant in Error. } Power of Attorney to Make supersedeas Bond.

Know all men by these presents that we, W. F. Barclay, C. H. Ryan, Wilbur F. Browder, J. C. Barclay, and Wm. Bryan, of Russellville, Logan county, Ky., hereby authorize and empower and direct Sam. M. Gaines, of Frankfort, Ky., for us and in our names respectively to execute the supersedeas bond required of the plaintiff in error in the above-styled action, in which action said Logan County National Bank, plaintiff in error, has prosecuted and
10½ is now prosecuting a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the court of appeals of Kentucky. Said Gaines is directed to sign our names to and acknowledge said bond as our act and deed.

Witness our hands this February 28, 1887.

W. F. BARCLAY. [SEAL.]
C. H. RYAN. [SEAL.]
WILBUR F. BROWDER. [SEAL.]
J. C. BARCLAY. [SEAL.]

Acknowledged before me by W. F. Barclay, C. H. Ryan, Wilbur F. Barclay, J. C. Barclay, and Wm. Bryan this February 28, 1887.
S. W. LINEBAUGH,
Deputy Clerk, Logan County C't.

Fee for acknowledgement, &c., $1.00, paid by plaintiff in error.

11 UNITED STATES OF AMERICA, *Court of Appeals of Kentucky,* } *ss:*

To R. P. Townsend, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington on the 10th day of October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of Kentucky, wherein the Logan County National Bank is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ

of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Wm. S. Pryor, chief justice of the court of appeals of Kentucky, this — day of July, in the year of our Lord 1887, and of our Independence the 112th.

July 20th, 1887.

Test: WILL. S. PRYOR,
Chief Justice Court of Appeals of Ky.

11½ [Endorsed:] Logan County Nat. Bank *vs.* R. P. Townsend. Citation.

Executed on the within R. P. Townsend by delivering to him a true copy of this citation this the 25 day of July, A. D. 1887.

J. R. PERRY, *S. L. C.*

Subscribed and sworn to before me by J. R. Perry, sheriff of Logan county, Kentucky, this the 26th day of July, A. D. 1887.

[Seal A. G. Rhea, Notary Public, Logan County, Ky.]

A. G. RHEA,
N. P., L. C., Ky.

Received of Logan County National Bank two dollars in full of my fee for executing this notice, July 26, 1887.

J. R. PERRY, *S. L. C.*

Received of Logan County National Bank fifty cents in full of fee as N. P. for taking acknowledgement of J. R. Perry, S. L. C.

A. G. RHEA, *N. P.*

12 UNITED STATES OF AMERICA, *District of Kentucky*, } *ss:*

The President of the United States of America to the judges of the court of appeals of Kentucky, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court of appeals of Kentucky, before you, between The Logan County National —, plaintiff, and R. P. Townsend, defendant, a manifest error hath happened, to the great damage of the said Logan County National Bank, as by its complaint appears, and, it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first day of the next October term, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Louisville, in said district, this 11th day of July, A. D. 1887, and of the Independence of the United States the 112th.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

SAM'L B. CRAIL,
C. C. C., K. D.

Allowed by—
WILL. S. PRYOR,
Chief Justice Ky. Court of Appeals.
July 20th, '87.

12*a* And on the 8 day of August, 1887, the appellant, The Logan County National Bank, filed in the clerk's office of the court of appeals of Kentucky the following supersedeas bond:

LOGAN COUNTY NATIONAL BANK
vs.
R. P. TOWNSEND.

Know all men by these presents that we, The Logan County National Bank, principal, and W. F. *Browder*, C. H. Ryan, W. F. Browder, J. C. Barclay, Wm. Bryan, sureties, are held and firmly bound unto R. P. Townsend in the sum of fifty-one hundred and seventy-eight and $\frac{55}{100}$ dollars, to be paid to the said R. P. Townsend, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our *as*, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this — day of ——, 18—.

Whereas the above-named Logan National Bank hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the court of appeals of Kentucky, at Frankfort:

Now, therefore, the condition of this obligation is such that if the above-named Logan County National Bank shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

W. F. BARCLAY,
By S. M. GAINES, *Att'y-in-Fact.*
C. H. RYAN,
By S. M. GAINES, *Att'y-in-Fact.*
WILBUR F. BROWDER,
By S. M. GAINES, *Att'y-in-Fact.*
12*b* JO. C. BARCLAY,
By S. M. GAINES, *Att'y-in-Fact.*
WM. BRYAN,
By SAM. M. GAINES,
Att'y-in-Fact.

Approved.
W. S. PRYOR,
Chief Justice Court of Appeals, Ky.

Court of Appeals of Kentucky.

LOGAN COUNTY NATIONAL BANK, Plaintiff in Error, *vs.* R. P. TOWNSEND, Defendant in Error. } Power of Attorney to Make Supersedeas Bond.

Know all men by these presents that we, W. F. Barclay, C. H. Ryan, Wilbur F. Browder, J. C. Barclay, and Wm. Bryan, of Russellville, Logan county, Kentucky, hereby authorize and empower and direct Sam. M. Gaines, of Frankfort, Kentucky, for us and in our names respectively to execute the supersedeas bond required of the plaintiff in error in the above-styled action, in which said Logan County National Bank, plaintiff in error, has prosecuted and is now prosecuting a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the court of appeals of Kentucky. Said Gaines is directed to sign our names to and to acknowledge said bond as our act and deed.

Witness our hands this July 15, A. D. 1887.

W. F. BARCLAY. [SEAL.]
C. H. RYAN. [SEAL.]
WILBUR F. BROWDER. [SEAL.]
J. C. BARCLAY. [SEAL.]
WM. BRYAN. [SEAL.]

Acknowledged before — by W. F. Barclay, C. H. Ryan,
12c Wilbur F. Browder, J. C. Barclay, and Wm. Bryan this July 15th, 1887.

S. W. LINEBAUGH,
Deputy Clerk of Logan County Court.

My fee, $1.00, paid by plaintiff in error.

At a term of said court of appeals held on the 5th day of September, 1887, the following order was made:

"Came appellant and tendered a supersedeas bond herein, which was approved by the chief justice of said court and ordered to be filed."

13 THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas before the Honl. W. S. Pryor, chief justice, and Joseph H. Lewis, W. H. Holt, and Caswell Bennett, associate judges of the court of appeals of the Commonwealth of Kentucky, at the capitol, in the city of Frankfort, on Thursday, the 10th day of February, 1887.

THE LOGAN COUNTY NATIONAL BANK, Appellant, *vs.* R. P. TOWNSEND, Appellee. } Upon an Appeal from the Logan Circuit Court.

Be it remembered that heretofore (to wit), on the 9th day of August, 1884, the appellants, The Logan County National Bank, by their counsel, Browder and Edwards, filed in the office of the clerk of the court of appeals of the Commonwealth of Kentucky the following transcript (viz):

STATE OF KENTUCKY, *Logan County*, } *sct:*

Court.

Pleas before Hon. William L. Dulaney, judge of the Logan circuit court, at the court-house, in Russellville, Kentucky, on the 24th day of February, 1881.

Preamble.

Be it remembered that on the 12th day of January, 1881,
14 came R. P. Townsend and filed in the office of the clerk of the Logan circuit court a petition against the Logan County Bank; which petition is in the words and figures following:

Petition.

Logan Circuit Court.

R. P. TOWNSEND, Plaintiff, *vs.* THE LOGAN COUNTY NATIONAL BANK, Defendant. } Petition Ordinary.

The plaintiff, R. P. Townsend, states that on the — day of June, 1879, he sold to the defendant, The Logan County National Bank, twelve thousand and eight hundred dollars ($12,800) of the bonds of Logan county, issued in aid of the Owensboro' and Russellville railroad, with 6 months' interest accrued thereon, for the consideration of 68½c. on the dollar, and the further consideration hereinafter named, to wit, that said bonds were sold to the defendant at its special instance and request and upon the promise and agreement of defendant made to plaintiff that defendant would replace the bonds to plaintiff at 68½c. on the dollar, or less, upon the demand of plaintiff,

and that as evidence of said promise and agreement he files herewith a writing, signed by Hugh Barclay, Jr., the then cashier of defendant; said writing is made an exhibit and marked "bond;" and plaintiff states that, relying upon said promise and agreement of defendant to replace the said bonds at 68½ cents, or less,
14½ upon demand, and which was part of the consideration, he sold to defendant the bonds before described, and that defendant, in violation of its said promise and agreement, has failed and refused and still refuses to comply therewith, although requested and demanded to do so. Plaintiff states that said bonds are now worth, and were at the time of demand made by plaintiff, dollar for dollar, or par, without accrued interest.

That the defendant is an incorporated institution, doing business in the town of Russellville, Ky., under and by virtue of the laws of the United States, with powers to contract and be contracted with, sue and be sued; that by reason of the failure and refusal of the defendant to comply with its said promise and agreement this plaintiff has been damaged in the sum of four thousand and thirty-two dollars, the difference between the price paid by defendant for said bonds, 68½ cents on the dollar, and their value now, dollar for dollar, and three hundred and eighty-four dollars, the amount of six months' accrued interest, and aggregating the sum of four thousand four hundred and sixteen dollars ($4,416).

Wherefore plaintiff prays for judgment for damages against defendant for the sum of four thousand four hundred and sixteen dollars ($4,416), for his costs, and for all proper relief.

R. P. TOWNSEND,
By JOHN S. RHEA AND
JOHN W. MALONE, *Attorneys.*

December 14th, 1880.

15 *Exhibit Marked "Bond," Filed with Pl'ff's Petition.*

Dr. R. P. Townsend.

SIR: Your request in regard to bond transaction is duly considered. I remember something of giving you a statement to replace your bonds at about 69; gave said statement last year, as cashier of Logan County National Bank; don't remember the verbiage, but thought then it was safe, and still think if I was well or had, rather, remained so it was a good investment for me.

Very respectfully, HUGH BARCLAY, JR.

P. S.—I don't remember exactly the amount, but think it was about $12,000.00.

H. B., JR.

And on the 24th day of February, 1881, in open court, the following order was made:

Order Filing Defendant's Demurrer to Pl'ff's Petition.

R. P. Townsend, Plaintiff,
vs.
The Logan County Nat. Bank, Defendant. } Ordinary.

Came defendant, by attorney, and, with leave of the court, filed demurrer to plaintiff's petition. Ordered that the same lay over for rehearing.

And afterwards, on the same day, in open court, the following order was made:

16 *Order Filing Defendant's Demurrer & Answer to Pl'ff's Petition.*

R. P. Townsend, Plaintiff,
vs.
Logan County National Bank, Defendant. } Ordinary.

Came defendant, by attorney, and, with leave of the court, filed demurrer and answer to plaintiff's petition.

Demurrer and Answer of Defendant.

Logan Circuit Court.

R. P. Townsend, Plaintiff,
vs.
The Logan Co. National Bank, Defendant. } 1st Demurrer. 2nd Answer.

The defendant demurs to plaintiff's petition because it does not state facts sufficient to constitute a cause of action.

Paragraph 1st. The defendant denies that the plaintiff at any time sold it $12,500.00 or any other amount in the bonds of Logan county.

Paragraph 2nd. The defendant denies that it ever promised or agreed with plaintiff that it would replace any bonds sold by plaintiff, at 68½ cents or at any other price, on demand or at any time or in any manner.

Paragraph 3rd. The defendant denies that plaintiff ever sold any of said bonds to Hugh Barclay, Jr., as defendant's cashier, for or on account of defendant. It has no knowledge or information sufficient to form a belief that plaintiff sold any of said bonds to said Barclay in any capacity. It denies that said Barclay was its
17 cashier when he wrote and delivered to plaintiff the writing filed by him. It denies that plaintiff sold any of said bonds relying upon any promise or agreement of defendant to replace any of them at any price, or that it ever made any such promise or agreement.

Paragraph 4th. Defendant is informed and charges that said Barclay was, in June, 1879, and before and after, engaged on his own account in an effort to depress the value of said bonds, and as

a means to that end he was endeavoring to induce and influence the Logan county court, composed of county judge and justices of the peace, to refuse to order a levy of tax to pay interest on said bonds; that the plaintiff then owned the bonds stated by him, and that he and said Barclay, in furtherance of their personal ends, combined and conspired to prevent said levy, said Barclay and plaintiff agreeing that said plaintiff should use his personal influence with one of said justices to prevent him from voting, as a justice and as a member of said county court, in favor of a levy and should allow said Barclay to sell said bonds, with bonds owned or controlled by said Barclay, at a price agreed on, and that said Barclay should and did guarantee that as a result of such sale the value of said bonds would be reduced, and that plaintiff could buy the same amount of said bonds at a price less than that at which it was agreed said Barclay might sell plaintiff bonds. Defendant states that said bonds were reduced in value by or after said sale far below the said
18 agreed price, and that plaintiff at any time during the succeeding month could have purchased the same amount of bonds at much less than he received for those sold for him by said Barclay.

Said Barclay deposited the proceeds of said bonds in defendant's bank to the credit of plaintiff, and the entire amount was paid by defendant to plaintiff on his, plaintiff's, checks. Defendant was in no way connected with said transaction, otherwise than that said Barclay deposited in its bank said proceeds and defendant paid them to plaintiff.

Paragraph 5th. Defendant says that said Barclay had no authority, right, or power to make for and on account of defendant the contract set out by plaintiff in his petition, and that defendant had no right, power, or authority to make it; that, as stated, it was a mere gambling transaction, a mere dealing in and betting upon the future value of said bonds, and was not authorized by defendant's charter or by law.

Wherefore defendant prays judgment dismissing said petition and for its costs and for all proper relief.

W. F. & E. M. BROWDER,
JAMES H. BOWDEN, *Attorneys.*

Wilbur F. Browder says he is the president of defendant's bank, and that he believes the statements of the preceding answer are true.

WILBUR F. BROWDER.

19 Subscribed and sworn to by W. F. Browder before me this — day of ——, 1881.

——— ———.

And on the 28th day of February, 1881, in open court, the following order was made:

Order Overruling Def't's Demurrer to Pl'ff's Petition, &c.

R. P. TOWNSEND, Plaintiff,
vs.
LOGAN CO. NAT. BANK, Defendant. } Ordinary.

Came the parties, by their attorneys.

The question of law arising upon the demurrer of defendant herein to plaintiff's petition being duly considered by the court, the same is overruled; to which ruling and judgment defendant excepts.

And afterwards, on the same day, in open court, the following order was made:

Order Filing Plaintiff's Demurrer to 4th & 5th Par. of Defendant's Answer and Order Sustaining Demurrer as to 5th and Overruling as to 4th Paragraphs.

R. P. TOWNSEND, Plaintiff,
vs.
LOGAN COUNTY NATIONAL BANK, Defendant. } Ordinary.

Came plaintiff, by his attorney, and with leave of the court filed demurrer to the 4th & 5th paragraphs of defendant's answer. The question of the law arising thereon being duly considered by the court, the same is sustained as to the 5th and overruled as to the 4th paragraph; to which ruling and judgment of the court plaintiff excepts.

20 *Plaintiff's Demurrer.*

Logan Circuit Court.

R. P. TOWNSEND, Plaintiff,
vs.
LOGAN COUNTY NATIONAL BANK, Defendant. } Demurrer.

The plaintiff demurs to paragraphs 4th and 5th of defendant's answer, and for cause says:

The same presents no facts sufficient to constitute a cause of defense.

JOHN S. RHEA, *Attorney.*

And afterwards, on the same day, in open court, the following order was made:

Order Filing Plaintiff's Reply.

R. P. TOWNSEND, Plaintiff,
vs.
THE LOGAN COUNTY NATIONAL BANK, Defendant. } Ordinary.

Came plaintiff, by his attorney, and with leave of the court filed reply herein.

Plaintiff's Reply.

Logan Circuit Court.

R. P. TOWNSEND, Plaintiff,
vs.
LOGAN COUNTY NATIONAL BANK, Defendant. } Reply.

The plaintiff, for reply to the answer of defendant and for reply to paragraph 3rd of said answer, says it is true that at the time Hugh Barclay, Jr., wrote and delivered the writing filed in 21 the petition he was not the cashier of defendant, but states and charges that he was defendant's president at the time he wrote and delivered it.

Replying to paragraph 4th of defendant's answer, plaintiff says he has no knowledge or information sufficient to form a belief and therefore denies that in June, 1879, before and after that time, said Barclay, on his own account, was engaged in an effort to depress the value of the bonds of Logan county, and as a means to that end was endeavoring to induce and influence the Logan county court, composed of the county judge and justices of the peace, to refuse to levy a tax to pay interest on said bonds. He denies that, in furtherance of their personal ends, he and said Barclay combined and conspired to prevent said levy, and that he agreed to use his influence with one of said justices to prevent his voting for a levy as a justice and member of said court and allow said Barclay to sell his bonds with bonds owned or controlled by said Barclay at a price agreed on, and that said Barclay should and did guarantee that as a result of such sale the value of said bonds would be reduced, and that plaintiff could buy the same amount of said bonds at a price less than that which it was agreed said Barclay might sell plaintiff's bonds for. He denies that the proceeds arising from the sale of said bonds *was* paid him by defendant on the checks of said Barclay.

Further replying, plaintiff charges that said Barclay was engaged in June, 1879, and before and after that time, in an effort to depress the value of said bonds, but not on his own account, but as 22 cashier and director of defendant, and with and by the knowledge and consent of defendant, and that defendant was engaged in an effort, in order to enrich itself, to depress the value of said bonds, and that said Barclay, as cashier and director of defendant, and W. F. Browder, the then and now president and director of defendant, was, in June 1879, engaged in an effort to depress the value of bonds of Logan county and to influence said court to make no levy of tax to pay interest on bonds—court composed of county judge and justices of the peace, to make no levy of tax to pay interest on said bonds; and, having replied to defendant's answer, plaintiff prays as in his petition and for all proper relief.

JOHN S. RHEA AND
JOHN W. MALONE, *Attorneys.*

R. P. Townsend says that the statements of the above reply he believes to be true.

R. P. TOWNSEND.

Sworn to before me this 28th day of February, 1881.

THOS. B. HARRISON, *C. L. C. C.*

And afterwards, on the same day, in open court, the following order was made:

Order Filing Defendant's Rejoiner.

R. P. TOWNSEND, Plaintiff,
vs.
THE LOGAN COUNTY NATIONAL BANK, Defendant. } Ordinary.

Came defendants, by their attorney, and with leave of the
23 court filed rejoinder herein.

Rejoinder of Defendant.

Logan Circuit Court.

R. P. TOWNSEND
vs.
LOGAN COUNTY NATIONAL BANK. } Rejoinder.

Defendant denies, by way of rejoinder, that it was, through said Barclay as cashier, or through said Browder as president, or through either of them, or through any of its directors or officers, or in any other way, in June, 1879, or at any other time, engaged in an effort to depress the value of said bonds. It denies that said cashier or president or any other officer of defendant, by and with defendant's knowledge or consent, was engaged in an effort to depress said bonds or in any way to influence the price of said bonds in order to enrich itself or to achieve any other purpose.

It denies that in June, 1879, or at any time prior thereto, said Barclay was one of its directors, or that said Barclay, as cashier or in any official capacity, appeared in said county court or elsewhere, in June, 1879, or at any other time, and urged said court to make no levy of tax to pay interest on said bonds. Defendant further says when said Barclay signed the paper referred to in the petition he was a mere nominal president of said bank; had then no actual business or official relations with it, and was acting then in open and pronounced hostility to it.

24 It further denies that said Browder, as its president or as director or as an individual, on account of the bank or his own account or any one's account, ever at any time appeared in said county court or elsewhere and urged or attempted to urge said court to make no levy of tax as aforesaid, or that he ever, as president, director, or otherwise, *ever* influenced or attempted to influence said court or any member thereof to do or not to do anything whatever

respecting said levy; said tax, said bonds, or anything in anyway pertaining thereto.

WILBUR F. BROWDER.

Wilbur F. Browder says that he is president of the defendant bank, and that he believes the statements of the foregoing rejoinder are true.

WILBUR F. BROWDER.

Sworn to before me by W. F. Browder Feb. 28th, 1881.

CHAS. S. GRUBBS, *P. J., L. C. C.*

And afterwards, on the same day, in open court, the following order was made:

Order of Continuance, February Term, 1881.

R. P. TOWNSEND, Plaintiff,
vs.
LOGAN COUNTY NATIONAL BANK, Defendant. } Ordinary.

Came the parties, by their attorneys, and on motion of defendant, who filed affidavit, it is ordered that this cause be continued at defendant's cost and adjudged that plaintiff recover of defendant
25 his cost of continuance at this term expended.

Defendant's Affidavit for Continuance.

Logan Circuit Court.

R. P. TOWNSEND
vs.
LOGAN COUNTY NATIONAL BANK. } Affidavit.

W. F. Browder, who is president of said bank, says it is not ready for trial in this action on account of the absence of Richard D. Browder, who has not been in this State since this action was begun. Said Richard B. was clerk in said bank before and during the time plaintiff's bonds were sold and the entries pertaining thereto were made; that all of said entries not made in the handwriting of said H. Barclay, Jr., were made by said Richard D. under the personal direction of said H. Barclay, Jr., who was the cashier of said bank; that said H. Barclay, Jr., is now of unsound mind and not in a condition to testify; that said Richard D. will prove, and it is true, that said entries made in his handwriting were made as then directed by said H. Barclay, Jr.; that some of the bonds were on special deposit with said bank before any of them were sold; that said Richard D., under said direction, made these entries, crediting plaintiff with proceeds of $6,800 Logan county bonds, at 68c., making $4,624, and with proceeds of $6,000 Logan county bonds, at 69c., making $4,140; and that on the same day H. Barclay, Jr., charged himself, by amount paid to R. P. Townsend, for all of said bonds, the amount paid being as stated above.

26 Defendant asks a continuance, not for a delay, but that it may have justice.

Said Richard D. resides in Montgomery, Ala., and his deposition can be procured by the next term of this court.

WILBUR F. BROWDER.

Sworn to before me February 28th, 1881, by W. F. Browder.

W. F. BARCLAY, *Notary Pub.*

And on the 22nd day of August, 1881, in open court, the following order was made:

Order of Continuance, August Term, 1881.

R. P. TOWNSEND, Plaintiff,
vs.
THE LOGAN COUNTY NATIONAL BANK, Defendant. } Ordinary.

Came the parties, by their attorneys, and, on motion of plaintiff, by attorney, it is ordered that this cause be continued at his cost. Adjudged that defendant recover of plaintiff its cost of continuance at this term expended.

And on the 25th day of August, 1882, in open court, the following order was made:

Order of Continuance, August Term, 1882.

R. P. TOWNSEND, Plaintiff,
vs.
THE LOGAN COUNTY NATIONAL BANK, Defendant. } Ordinary.

Came the parties, by their attorneys, —, on motion of defendant, it is ordered that this suit be continued and adjudged that
27 plaintiff recover of defendant his cost of continuance at this term expended.

And on the 16th day of January, 1883, in open court, the following order was made:

Jury Trial, January Term, 1882.

R. P. TOWNSEND, Plaintiff,
vs.
LOGAN COUNTY NATIONAL BANK, Defendant. } Ordinary.

The parties appeared, by their attorneys, and, announcing themselves ready for trial, the following jury, to wit: 1, H. M. Whitaker; 2, M. F. Ward; 3, Jas. W. Hughes; 4, B. E. Barker; 5, Geo. F. Arnold; 6, Alfred Roberts; 7, G. F. Givens; 8, W. H. King; 9, Jno. E. Small; 10, J. H. McGinnis; 11, W. C. Cooper, and, 12, R. R. Lamb, were sworn well and truly to try the issue.

There being no time to conclude the trial this day, the hour for

adjournment having arrived, — were permitted to separate, under the admonition of the court, until to-morrow morning, half past 9 o'clock.

And on the 17th day of January, 1883, in open court, the following order was made:

Continuation of Trial, &c.

R. P. Townsend, Plaintiff,
vs.
Logan County National Bank, Defendant. } Ordinary.

Came the parties, by their attorneys. The jury assembled according to adjournment, and, after hearing the evidence, there not being time to conclude the trial this day, were again permitted to separate, under the admonition of the court, until to-morrow morning, half past 9 o'clock.

28 And on the 18th day of January, 1883, in open court, the following order was made:

Order Discharging Jury and Continuing Case.

R. P. Townsend, Plaintiff,
vs.
The Logan County National Bank, Defendant. } Ordinary.

Came the parties, by their attorneys. Upon the assembling of the jury, according to adjournment, one of the jurors, W. F. Ward, not answering, a warrant of arrest was ordered by the court commanding the sheriff to bring said Ward forthwith before the court. The clerk of the court immediately issued said warrant of arrest, which was returned by the sheriff "not executed, the defendant being sick;" and it appearing to the satisfaction of the court that said juror, W. F. Ward, is confined to his home with sickness, so ill as to prevent his attendance, it is ordered by the court that the jury herein be discharged from the further consideration of this cause, and that the same be continued.

And on the 16th day of July, 1883, in open court, the following order was made:

Order Against Agreement. Special Judge to Try Cause, &c.

R. P. Townsend, Plaintiff,
vs.
Logan County National Bank, Defendant. } Ordinary.

Came the parties, by their attorneys, and, on motion of plaintiff, by attorney, who filed affidavit that "he does not believe the
29 judge of this court, Hon. W. L. Dulaney, will afford him a fair and impartial trial," thereupon the judge of this court

vacated the bench and retired from the court-room, and, upon consultation of the parties, by agreement Hon. Robert Rodes was chosen special judge to try this cause.

Pl'ff's Affidavit Swearing the Presiding Judge off the Bench.

Logan Circuit Court.

R. P. TOWNSEND
vs.
LOGAN COUNTY NATIONAL BANK. } Affidavit.

The plaintiff, R. P. Townsend, says he does not believe the judge of this court, Hon. W. L. Dulaney, will afford him a fair and impartial trial.

This July 16th, 1883.

R. P. TOWNSEND.

Sworn to by R. P. Townsend before me this 16th July, 1883.

THOS. B. HARRISON, *C. L. C. C.*,
By H. L. EVANS, *D. C.*

And on the 22nd day of January, 1884, in open court, the following order was made:

Order Swearing in Rob't Rodes as Special Judge, &c., and Jury Trial.

R. P. TOWNSEND, Plaintiff,
vs.
THE LOGAN COUNTY NATIONAL BANK, Defendant. } Ordinary.

Came the parties, by their attorneys. Hon. W. L. Dulaney declining to sit in this case, by agreement of parties Hon. Robert Rodes, of the city of Bowling Green, Ky., a practicing attorney of this bar and qualified under the law, was chosen special judge to try this cause.

Thereupon said Robert Rodes appeared and took the oaths required by the constitution and laws of this State of judges and took his seat as special judge herein.

The parties then announcing themselves ready for trial, the following jury, to wit: 1, J. A. Noe; 2, W. B. Marshall; 3, M. W. Simmons; 4, Geo. S. Vick; 5, J. A. Layne; 6, John R. Mize; 7, R. E. Small; 8, Z. T. Roberts; 9, J. J. Campbell; 10, J. P. Foster; 11, F. M. Page, and, 12, J. W. Lamb, were sworn well and truly to try the issue, and after hearing the conclusion of the evidence introduced by the plaintiff, defendant, by attorney, moved the court to give the jury peremptory instructions to find for the defendant; and, pending the argument on said motion, the hour for adjournment having arrived, the jury were permitted to separate, under the admonition of the court, until to-morrow morning, half past 9 o'clock.

And on the 23rd day of January, 1884, in open court, the following order was made:

Order Overruling Def't's Motion for Peremptory Instructions and Continuation of Trial.

R. P. TOWNSEND, Plaintiff,
vs.
THE LOGAN COUNTY NATIONAL BANK, Defendant. } Ordinary.

Came the parties, by their attorneys, Special Judge Robert Rodes presiding. The jury assembled according to adjournment.

The question of law arising upon the motion of defendant
31 to give the jury peremptory instructions to find for it being duly considered by the court, the same is overruled; to which ruling and judgment of the court defendant excepts; and, after hearing the conclusion of the evidence, there not being time to conclude the trial this day, the jury were permitted to again separate, under the admonition of the court, until to-morrow morning, half past 9 o'clock.

And on the 24th day of January, in open court, the following order was made:

Continuation of Trial.

R. P. TOWNSEND, Plaintiff,
vs.
THE LOGAN COUNTY NATIONAL BANK, Defendant. } Ordinary.

Came the parties, by their attorneys, Special Judge Robert Rodes presiding. The jury assembled according to adjournment, and, after hearing part of the argument of counsel, the hour for adjournment having arrived, were permitted again to separate, under the admonition of the court, until to-morrow morning, half past 9 o'clock.

And on the 25th day of January, 1884, in open court, the following order was made:

Conclusion of Trial and Judg't for Plaintiff.

R. P. TOWNSEND, Plaintiff,
vs.
THE LOGAN COUNTY NATIONAL BANK, Defendant. } Ordinary.

Came the parties, by their attorneys, Robert Rodes, special
32 judge, presiding.

The jury assembled according to adjournment and, after hearing the conclusion of the arguments of counsel, retired to consult upon their verdict, and returned, under the direction of the court, the following special verdict:

"Questions to be answered by the jury:

"1st. Did Townsend sell the bonds to the defendant bank or to Hugh Barclay, Jr.?

"Answer. To defendant bank.

"2nd. What was the contract made at date of sale?

"Answer. That defendant would replace the bonds to plaintiff at price at that time or less."

Said jury also returned the following general verdict:

"We, the jury, find for plaintiff.

"R. E. SMALL, *Foreman.*"

Thereupon plaintiff, by attorney, moved the court for judgment on the finding of the jury.

It is therefore adjudged by the court that said motion be sustained, and that plaintiff recover of defendant, The Logan County National Bank, the sum of four thousand four hundred and sixteen dollars, the amount claimed in the petition, with interest thereon, at the rate of six per cent. per annum, from the 25th day of January, 1884, until paid, and his costs herein expended, for which execution may issue after ten days.

And afterwards, on the same day, in open court, the following order was made:

33 *Order Filing Def't's Motion for New Trial.*

R. P. TOWNSEND, Plaintiff,
vs.
THE LOGAN COUNTY NATIONAL BANK, Defendant. } Ordinary.

Came the defendant, by her attorneys, and, with leave of the court, filed motion and grounds for a new trial of this cause.

Ordered, That said motion be entered on the motion docket and lie over for hearing.

And on the 29th day of January, 1884, in open court, the following order was made:

Corrected Judgment and Order Overruling.

R. P. TOWNSEND, Plaintiff,
vs.
THE LOGAN COUNTY NAT. BANK, Defendant. } Ordinary.

(Hon. Robert Rodes, special judge, presiding.)

Def't's Motion for New Trial.

The grounds and motion for a new trial having been considered by the court, it is adjudged that said motion by defendant be overruled and a new trial refused; to which defendant excepts and prays an appeal to the court of appeals, which is granted; but it appearing to the court that there is an error in the amount of the judgment as already entered, the court now adjudges that said judgment be set aside, and it is now adjudged that in lieu of that judgment the following is now entered as the judgment of the court, namely:

2d Judgm'nt.

It is adjudged that plaintiff recover of defendant the sum of four thousand and thirty-two dollars, with interest, at the rate
34 of six per cent. per annum, from this day, together with his costs in this case expended, and for which plaintiff may have execution.

To this order the defendant excepts and asks leave to file bills of exceptions herein, which is granted, and likewise prays an appeal to the court of appeals, which is granted.

And on the 1st day of February, 1884, in open court, Judge Robert Rodes presiding, the following order was made:

Order Filing Def't's Bill of Exceptions.

R. P. TOWNSEND, Plaintiff,
vs.
THE LOGAN COUNTY NAT. BANK, Defendant. } Ordinary.

This day came defendant and produced and filed his bills of exceptions, marked A B, which were signed and approved and made a part of the record, as shown by the certificate and signature of the presiding judge approving same, and are now filed this day.

Bill of exceptions No. 1, presented to Hon. W. L. Dulaney, judge of this court, for his signature, marked ("A B").

Def't's Bill of Exceptions.

Logan Circuit Court. January Term, 1884.

R. P. TOWNSEND, Plaintiff,
vs.
THE LOGAN COUNTY NATIONAL BANK. } Bill of Exceptions.

Be it remembered heretofore, to wit, on the 24th day of February, 1881, at the February term, 1881, of said court, the defendant
35 appeared and by its counsel filed in open court a general demurrer to the plaintiff's petition (the answer being filed at the same time); whereupon the parties appeared by their attorneys, and the questions of law arising on the demurrer to the petition having been duly considered by the court, after argument thereof by counsel, it was adjudged by the court that said demurrer be, and the same was, overruled; to which ruling and judgment the defendant at the time excepted and still excepts; and, the answer having been filed as aforesaid, the plaintiff appeared by his counsel and filed a special demurrer to paragraph No. 4 of the defendant's answer and a special demurrer to paragraph No. 5 of defendant's answer; whereupon the parties appeared by their attorneys, and the question of law arising on said special demurrers to said two paragraphs having been duly considered by the court, after argument

thereof by counsel, it was adjudged by the court that the special demurrer to the 4th paragraph thereof be, and the same was, overruled, and it was adjudged that the special demurrer to the 5th paragraph of said answer be, and the same was, sustained; to which ruling and judgment in sustaining the special demurrer to the 5th paragraph of the answer the defendant at the time excepted and still excepts.

And thereafter, to wit, at the January term, 1883, of said court, on the 16th day of said month of January, the parties appeared by their counsel and, announcing themselves ready for trial, a jury was empanelled and sworn to try the issue, and plaintiff, being sworn, testified as follows:

36 *Evidence of R. P. Townsend, Pl'ff Herein.*

"I am the plaintiff herein. Some time in June, 1879, Mr. W. K. Rayburn brought me a message from Hugh Barclay, Jr., who was the cashier of the defendant bank, that he wanted to see me; that he had received a dispatch that day from Louisville stating that he could give 68½ or 69 cents for Logan county bonds—bonds issued by Logan county in aid of the construction of the Owensboro' and Nashville R. R.; that if I would come up and see him he would take my bonds at the very best price that could be obtained, and to assure me that he would replace them, on demand, at the same price, I went up to see Mr. Barclay, and did see him.

He was in the bank. We went into the directors' room, or rear room, and had a talk." (Objection being here made to plaintiff's stating anything that Barclay said to him, on the ground that Barclay was at the time a person of unsound mind and had never, when of sound mind, testified concerning the transaction, and the objection being sustained by the court, the witness detailed nothing that was said by Barclay at that time.) Continuing, the witness said: "I saw Mr. Browder, president of the bank, that day; he advised me to make the trade with Barclay, saying that he was satisfied the bonds would go down; that an article would appear the next day in the town paper which would have the effect of depressing them. I had $12,800.00 of bonds, that being their face value."

Deposition of W. K. Raybourn for Plaintiff.

The deposition of W. K. Raybourn, taken by consent at the office of John H. Baskett, in the city of Nashville, in the State
37 of Tennessee, on the 23rd day of December, 1882, on behalf of the plaintiff, in an action now pending in the Logan circuit court, State of Kentucky, wherein R. P. Townsend is plaintiff and The Logan County National Bank is defendant.

The said RAYBOURN, being first duly sworn, deposes as follows:

By att'y for plaintiff:

1 Question. State your age, residence, and occupation.

Answer. Age, 50; reside in Nashville; occupation, merchant.

2d. State where you resided during the year 1879.

Ans. In Adairville, Logan county, Ky.

3d. State whether or not you are acquainted with the plaintiff herein, and if you know of the existence of the Logan County National Bank, and, if yea, did you know who were its officers in 1879; if yea, who were they.

Ans. I am acquainted with plaintiff and have known — about 15 years. I know the existence of the Logan County Bank. I know that Hugh Barclay, Jr., was cashier, and I think J. L. Rizer was the president, I think at that time, in 1879.

4th. State whether or not the plaintiff was the owner and holder of any Logan county bonds in the year 1879; if yea, state amount or number of bonds he owned and held and the character of bonds.

Ans. I know that he was the owner of $6,000 worth. He had them there on deposit in my safe. I think they were $1,000 bonds each. Of this I am not positive, but that is my recollection of them. They were Logan county bonds, issued for railroad purposes,
38 for the Owensboro' and Russellville R. R. Co.

5th. State whether or not plaintiff had other bonds of the same character deposited with the defendant at any time during the year of 1879; and, if so, how many.

Ans. I know that he had bonds deposited with the bank. Mr. Barclay told me — had bonds there, but do not know the amount.

6th. State whether or not plaintiff had any transaction with defendant in which the defendant became controller of said bonds in the year 1879; if yea, state all you know in reference to said transaction.

Ans. I know this much, that I was in the Logan County National Bank in June, 1879. Mr. Barclay dispatched or received dispatch from Louisville as to the value of the bonds. Mr. Barclay told me the price for the bonds was 68½ cents, and he told me to tell Dr. Townsend that if he would take that amount for his bonds that he, Barclay, would insure him back bonds of like character, if he wished them, at that price or at a lower rate.

7th. State whether or not you delivered the message to plaintiff as directed by said Barclay.

Ans. I did.

8th. State whether or not plaintiff let defendant have his bonds on the receipt of said communication.

Ans. I can say this, that he came to my store, and I delivered to him his bonds, about $6,000.00 but do not know of my personal knowledge whether he delivered them to the defendant. He called at my store for the bonds that day after I delivered him the message from Mr. Barclay.

9th. State whether or not plaintiff, on the day you delivered
39 him said bonds, went to Russellville and whether or not defendant's place of doing business is in said town.

Ans. I think the plaintiff went to Russellville the day I delivered the bonds to him, and Russellville is the place defendant does its business.

10th. State whether or not defendant was engaged in manipulating the sale and value of such bonds at the time you had said conversation with its cashier.

Ans. One reason I have is that the cashier of defendant was trying to get control of as many of the bonds — he could for defendant, and this is about all I know in relation to the matter. The message that I bore to Dr. Townsend was another evidence of the fact to me that he was trying to bear them, as the price for bonds would be at a less price.

Answer objected to by def't.—J. H. Baskett, notary public.

11th. State whether or not the conversation you had with defendant's cashier in reference to the purchase of plaintiff's bonds occurred in the banking-house of defendant within banking hours and in the cashier's department in said banking-house.

Ans. I answer, it did. It was during banking hours and in the bank.

Cross-examined by W. F. BROWDER, att'y for defendant:

1st. In your conversation with Barclay, as detailed in your reply to question No. 6 of the examination-in-chief, did Barclay say he had written or sent word to Townsend concerning his bonds?

Ans. He said he had written to Townsend. That is my
40 best recollection about it.

2nd. How long before that did he say he had written?

Ans. I don't remember.

3rd. Did he say he had written more than once to him on this subject?

Ans. I don't think he did. I don't remember that he did.

4th. Did he say that the bank wanted to buy Townsend's bonds, and that the bank would insure a reimbursement in them at the same or a lower rate?

Ans. He did not mention the bank. He spoke of himself.

5th. Did he say at what time, in his opinion, said bonds could be repurchased thereafter at the same or a lower rate?

Ans. He did not.

6th. Did not said bonds—Logan county bonds—decline in price immediately thereafter to about 55 and 60 cents?

Ans. They declined, but how soon after I don't recollect. They declined to 60 cents. I think it was inside of a year.

7th. At the time you speak of were you not cashier of the Bank of Adairville, of which plaintiff Townsend was then and is now president?

Ans. I was not. It was not organized till Jan'y, 1880. I was cashier after it was organized.

8th. In June, 1879, or thereabouts were not certain parties in Logan county engaged in efforts to depress the price of Logan county bonds? Was not plaintiff so engaged at the time?

41 Ans. There was a movement of that sort in Logan county, but I do not know that the plaintiff was engaged in it.

9th. Did you not have a conversation with W. F. Barclay on No-

vember 11, 1880, in the defendant's banking-house, in which you purported to state to him all that Hugh Barclay, Jr., had said to you in June, 1879, respecting the Townsend bonds?

Ans. I don't remember that I had such a conversation. I did have a conversation with Mr. Barclay, but what was said I do not recollect.

10th. Did you not on that occasion and in the conversation give said W. F. Barclay a statement in writing, signed by yourself, purporting to contain all that Hugh Barclay, Jr., had said to you in June, 1879, about the Townsend bonds?

Ans. Yes, sir; I remember writing something and giving it to him.

11th. Do you remember the contents of said paper?

Ans. I do not, but it was something similar to what is therein stated.

12th. State whether or not the contents of that paper written by you in Nov., 1880, or the statements made in this deposition now respecting said Hugh Barclay Jr.'s message to Townsend by you is the correct version of said matter.

Ans. My recollection is that it is about the same.

13th. Was plaintiff present at that conversation in Nov., 1880?

Ans. I don't think he was present at the time I wrote the paper-writing referred —.

42 14th. Examine the paper here given you, dated Nov. 11th, 1880, and signed by you, and state if it is the paper referred to; and, if so, file it as a part of your answer to this question.

Ans. The paper shown me is the writing I gave to Mr. Barclay, and it is here filed as a part of this deposition, marked Exhibit "A."

15th. Replying to direct question No. 10, you state that defendant was engaged in manipulating the sale and price of Logan county bonds in June, 1879, or thereabouts. Now state whether Hugh Barclay, Jr., on his own account or the defendant bank, was so engaged at that time.

Ans. My answer is that he was engaged, but whether he was so engaged for himself or as cashier I do not know. I know that he was then cashier of the Logan County National Bank.

W. K. RAYBURN.

Notary Public's Certificate to Deposition of W. K. Rayburn.

STATE OF TENNESSEE, }
Davidson County. }

I, John H. Baskett, a notary public in and for the county aforesaid, do certify that the foregoing deposition of W. K. Rayburn was taken before me by consent of the parties, plaintiff and defendant, in my office, in the city of Nashville, Davidson county, Tennessee, on the 23rd day of Dec'r, 1882; that the witness was first sworn by me that the evidence he should give in the action should be the truth, the whole truth, and nothing but the truth, before giving his testi-

mony; that his statements were reduced to writing by me in
43 his presence and were read to and subscribed by him in my presence; the plaintiff and his attorney, A. G. Rhea, and the defendant — his attorney, W. F. Browder, were present.

Given under my hand and seal of office this 23rd Dec'r, 1882.

[SEAL.] JOHN H. BASKETT,
Notary Public.

EXHIBIT "A." Filed with Deposition of W. K. Rayburn.

RUSSELLVILLE, KY., *Nov'r 11th*, 1880.

DEAR SIR: I was in the Logan County National Bank in the month of June, 1879, and heard Mr. Hugh Barclay say that he had just received a dispatch from Louisville giving the price of Logan county bonds at 68½c., and he sent word to Dr. Townsend by me that he would give him that price for his bonds, and, furthermore, that he would insure him to get the same amount of bonds back at the same or a less price.

Nov. 11, 188–.

W. K. RAYBURN.

And after the conclusion of W. K. Rayburn's testimony plaintiff closed his case, and thereupon the defendant moved the court to instruct the jury peremptorily to find for defendant; which motion was overruled by the court; to which ruling defendant at the time excepted and still excepts.

All of the foregoing proceedings herein were had before the Hon. W. L. Dulaney, the judge of the Logan circuit court, and for that reason so much of this bill of exceptions as goes before is pre-
44 sented to said judge for his signature.

And thereafter, to wit, on the 22nd day of January, 1884, at the January term, 1884, of said court, the parties appeared, by their attorneys, and, announcing themselves ready for trial, a jury was empanelled and sworn to try the issue, and the following evidence was heard, to wit:

The following bill of exceptions was presented to and certified by Hon. Robert Rodes, special judge herein:

Def't's Bill of Exceptions Marked X Y.

Logan Circuit Court. January Term, 1884.

R. P. TOWNSEND, Plaintiff,
vs.
THE LOGAN COUNTY NATIONAL BANK, Defendant. } Bill of Exceptions.

Be it remembered that heretofore, to wit, on the 22nd day of January, 1884, at the January term, 1884, of said court, the parties appeared, by their attorneys, and, announcing themselves ready for trial, a jury was empanelled and sworn to try the issue, and on said trial the following evidence was given, to wit:

Evidence of R. P. Townsend for Pl'ff on Second Trial.

1st. The plaintiff, R. P. TOWNSEND, was sworn, and testified as follows: "I am plaintiff in this action. Some time in June, 1879, W. K. Rayburn brought me a message from Hugh Barclay, Jr., saying that he had received a telegram from Louisville, and that he could get 69 cents for Logan county bonds, and that if I would come up he would give me the highest price that could be gotten for the bonds at the time. I came up shortly afterwards and went
45 to the Logan County National Bank and saw him. He said he had taken the liberty of selling $6,800 in Logan county bonds that I had on deposit there, in Louisville, at 68½ cents on the dollar, and that if I wished it he would replace them at the same or a lower price. I told him it was all right. He said he could get 69 cents for the $6,000.00 in bonds I brought up with me that day, and that he would replace them at the same or a lower price if I wished it. I sold the bonds to the defendant, The Logan County National Bank; made the sale to and contract with Hugh Barclay, Jr., as cashier. I sold them to him on this condition: I sold them to him as cashier of the bank, in the bank, during banking hours, and delivered the bonds ($6,000.00 of them) at that time. I had a conversation that day with W. F. Browder, president of said bank, and he advised me to make the trade. He said the bonds would, in his opinion, go down, as an article would appear in the next issue of the town paper tending to depress the bonds. The bonds were worth dollar for dollar, or one hundred cents on their face value, at the date I demanded them of the defendant. I did demand them and it refused to return them. This refusal occurred in this way: I demanded the bonds of the bank through W. F. Barclay, its cashier, who said he would lay it before the board of directors. He afterwards wrote to me and told me they declined to pay it and to take all legal steps to resist it.

Cross-examination:

I made the trade in the back room of the bank and de-
46 livered over the bonds in the bank. I had $6,800.00 in bonds on deposit there for some time, and after Hugh Barclay, Jr., told me he had sold said bonds I receipted for them on the books of the bank and delivered the $6,000.00 in bonds brought up that day to said Hugh Barclay, Jr. The money for the bonds was placed to my credit in the bank that day by Hugh Barclay, Jr., and I afterwards ordered $8,000.00 of it sent to E. M. Flack, at Hopkinsville, to buy tobacco.

This was after the bonds went down into the fifties; did not demand the bonds back at that time, but withdrew the money, and it was sent to E. M. Flack. After this I wrote to the bank to borrow $200.00 for 60 days. They let me have the money, but required note with good security. I wrote several letters, the same here shown me, about this time.

Letter Marked "1" and Made a Part of the Evidence of Plaintiff Townsend.

ADAIRVILLE, KY., *August 4th*, 1879.

Hugh Barclay, Jr., Russellville, Ky.

DEAR SIR: I dislike to bore a man in regard to business, but, sir, it is a matter I wish you to attend to and to attend to promptly. Did you receive a letter from me from Hadensville? I expected an answer from it Saturday eve., but did not receive it. The substance of said note was that the money you stated you had
47 sent to D. B. Smith had never been received. I also instructed you to send said $8,000 instead of D. B. Smith; to send it per express to E. M. Flack, Hopkinsville, Ky. My interest has already been jeopardized by your delay, and I would be glad to have you notify me by the bearer of this that you have sent said money to E. M. Flack, Hopkinsville, Ky.

Yours resp't, R. P. TOWNSEND.

Letter Marked "2" & Made Part of the Evidence of Plaintiff Townsend.

ADAIRVILLE, KENTUCKY, *December 30th*, 1879.

Hugh Barclay, Jr., Russellville, Ky.

DEAR SIR: I want two hundred dollars the first day of January for thirty days. Please write me by return mail, if I can get it, the security you want and send a blank note. Tell me what you think of the levy being made in January.

Yours respectfully, R. P. TOWNSEND.

Letter Marked "3" & Made Part of the Evidence of Pl'ff Townsend.

ADAIRVILLE, KENTUCKY, *February 10th*, 1880.

Hugh Barclay, Jr., Russellville, Ky.

DEAR SIR: I have been expecting a trip to your city for
48 some weeks, but the force of circumstances has prevented. I think now I can come up the last of this week or the first of next. Will you be at home either time? If so, I would like to hold a little conference with you. What can you buy L. C. bonds for now?

Respectfully, R. P. TOWNSEND.

After Hugh Barclay became paralyzed I wrote a number of letters to W. F. Barclay, his brother, the same letters here shown me.

Letter Marked "4" & Made Part of the Evidence of Pl'ff Townsend.

ADAIRVILLE, KY., *November 8th*, 1880.

Wilbur Barclay, Esq., Russellville, Ky.

DEAR SIR: What is your brother Hugh's address? Is his health in a condition to respond to a business communication? Please

let me hear from you at your very earliest convenience, and much oblige,

Yours respectfully, R. P. TOWNSEND.

Letter Marked "5" & Made Part of the Evidence of Pl'ff Townsend.

ADAIRVILLE, KENTUCKY, *November 9th*, 1880.

W. F. Barclay, Russellville, Ky.

DEAR SIR: Yours of the present inst. to hand. I presume you are Hugh's representative while he is in his present condi-
49 tion. If so, I will come up on Thursday and present to you the matter of business I have with your brother. You can then determine as to its importance and as to the propriety of presenting it to him. Please let me hear by return mail if you will be at home Thursday next, &c.

Yours truly, R. P. TOWNSEND.

Statement Marked "6" and Made Part of the Plaintiff's Evidence, R. P. Townsend.

Some correspondence passed between us in reference to my claim and I came up to town in response to one of his letters and called on him, in company with W. K. Rayburn, at the bank. At his request I wrote out a statement of my claim and requested him to lay it before his brother, Hugh Barclay, Jr., if in the opinion of his physicians it would be prudent to do so. The paper here shown me is the statement alluded to.

In June, 1879, Mr. W. K. Rayburn brought me a message from Mr. Hugh Barclay, stating that if I would come up and see him that he would give me the very best price for my bonds that could be obtained at that time; that he had just received a dispatch stating that he could give 68½ cents, and stating, furthermore, that he would give me a better price if it could be obtained when I came up. He stated, furthermore, to me that Mr. Barclay told him to assure me that he would replace at the same price or less the bonds that he might buy of me. I came up promptly, and Mr. Barclay told me that he had taken the privilege of selling the bonds he had here of mine at 69c., and that he would give me 68½ for those I brought up; all of which, he assured me, he would replace at the
50 same or a less price.

R. P. TOWNSEND.

W. K. Rayburn also wrote out a statement of his recollection of the message sent me by Hugh Barclay, Jr. I knew at this time that W. F. Barclay was cashier of the bank. At the time I got the statement from Hugh Barclay, Jr., on the 14th December, 1880, I knew that said H. Barclay, Jr., had no connection with the bank except nominally. I knew this from letters of W. F. Barclay and from rumor. W. F. Barclay wrote me that he had laid the matter before Hugh, but had not heard from him on this subject, but that

his physician thought he had softening of the brain, and that if I made any settlement with him his family would not submit to it. When I came up with my bonds and saw H. Barclay, Jr., he said the bonds were fluctuating in the market; that he thought the present price a good one; he believed they would go lower; that he felt so confident of this he was almost willing to guarantee it. This was about all that was said at the time he bought my bonds and is the substance of the contract made between us at the time I sold him my bonds. I did not ask him (Hugh Barclay, Jr.) whether he was acting for himself in this trade or for the bank; took it for granted he was acting for the bank. If Logan county bonds had gone to 25 cents on the dollar I would have felt bound to take them back and paid 69 cents for them if Barclay had asked it. I would have felt bound because this was part of our contract.

Under the contract made at the time of sale I would have felt
51 bound to take them back at that or any other price and paid 69 cents for them. The first time I made demand for the bonds was the 14th day of December, 1880, after I received the paper from Hugh Barclay, Jr., at the Forst House. This statement (see page 3 of record for paper marked "bond," referred to here), written on brown paper with pencil and filed with the petition, was gotten on said date, and the same day I called at the bank and demanded the bonds. W. F. Barclay, the cashier, said he would lay the matter before his board of directors and let me know the result of the meeting. He afterwards wrote me that they declined to pay it. When I saw Hugh Barclay, Jr., and got the paper from him he had left his family and was living at the hotel. He was not connected with the bank, except nominally, nor finally with his family or the officials of the bank, so I was told. His brother had informed me before this that he had softening of the brain; that his family would not recognize any settlement I might make with him. About two months after I got the paper he was adjudged insane, and to have been insane at the time I got the paper, on the 14th day of December, 1880. I did not tell W. W. Lyles that I would use my influence with Aaron Burr, a magistrate, to get him to vote against levy to pay interest on the bonds; did not tell him that I had seen Burr and gotten him to agree to vote against a levy; did not use my influence with Burr to get him to pass the levy; did not tell W. F. Barclay at the bank, when I gave him the statement of my claim, or

any time, that Hugh Barclay, Jr., had bought my bonds in
52 order to secure my influence with Burr as magistrate, and with the understanding that I was to control him in the interest of repudiation, or to get him to vote against the levy, as he occupied a part of my office and I could control him; did not tell L. C. Ganigus, in Adairville, that I had sold my bonds, and that Hugh Barclay, Jr., had agreed to let me know or tell me when to buy back. I believed the bonds would go up when I sold them—had faith in them, and was not engaged in efforts to depress the bonds; was not in favor of passing the levy; never took a writing at the time the trade was made; only writing I ever got from Hugh Barclay, Jr., was at the Forst House, December 14th, 1880.

Redirect examination:

It was a positive trade I made with Hugh Barclay, Jr., at the time I sold my bonds, to return the bonds on demand, at the same price or lower.

Plaintiff next read the deposition of Hugh Barclay, Jr., as follows:

Notice of Pl'ff to Take Deposition of H. Barclay, Jr.

Logan Circuit Court.

R. P. TOWNSEND, Plaintiff,
vs.
LOGAN COUNTY NATIONAL BANK, Defendant. } Notice.

The defendant, The Logan National Bank, is hereby notified that I will attend, at the Grand Hotel, in the city of Indianapolis, county of Marion, and State of Indiana, on Monday, Feb. 5th, 1883,
53 for the purpose — taking the deposition of Hugh Barclay, Jr., to be read as evidence in my behalf in an action now pending in the Logan circuit court, wherein I am plaintiff and you are defendant, this Feb. 1st, 1883.

R. P. TOWNSEND,
By Attorney.

Executed by delivering to W. F. Barclay, cashier of the Logan County National Bank, a copy of this notice, W. F. Browder, the president of the bank, being absent from the county, this Feb. 1st, 1883.

J. C. VICK, *C. L. C. C.*

The Deposition of Hugh Barclay, Jr., Taken for Pl'ff.

The deposition of Hugh Barclay, Jr., taken on the 5th day of Feb., 1883, at the Grand Hotel, in the city of Indianapolis, county of Marion, and State of Indiana, to be read as evidence on behalf of plaintiff in an action between R. P. Townsend, plaintiff, and The Logan County National Bank, defendant, pending in the Logan circuit court.

Examined by JOHN S. RHEA, attorney for plaintiff:

Question 1st. State your age, residence, and occupation.

Ans. I am (36) thirty-six years old; was that age 5th March, 1882; residence, Russellville, Ky.; was a banker for three years; have been so paralyzed I couldn't attend to business, and am here now under treatment therefor.

2nd. How long have you lived in Russellville and how long have you been engaged in the banking business?

Ans. I have lived there all my life, with the exception of a
54 few years—some 18 years ago; commenced business as a private banker May, 1870, and until paralyzed was continuously cashier or president of an incorporated bank or on my own account.

3rd. What bank or banks were you connected with during this time?

Ans. From May till the organization of the Logan County Bank, doing business under a State charter. I was in business as a private banker, then as cashier of the said bank to the organization of the Logan County National Bank, in July or August, 1874, when I was elected cashier thereof, which position I filled to July or August, 1879, when I was elected president thereof, and so remained till January, 1881.

4th. Were you or not cashier of the Logan County National Bank in 1879 and in the month of June of that year?

Ans. I was.

5th. Did you or not at that time buy any bonds of the plaintiff, R. P. Townsend?

Ans. I did.

6th. Did you buy those bonds as an individual, on your own account, or as cashier of the bank for the bank?

Ans. As cashier of the bank for the bank.

7th. How many and what character of bonds were they?

Ans. As near as I can recollect, there were about twelve thousand dollars (par value) of the bonds issued by the Logan county court to the Owensboro' and Russellville railroad.

8th. You say about 12,000.00 (par value) bonds issued by
55 Logan county court to O. & R. R. R. Do you mean par value or face value?

Ans. I mean face value.

10th. What price did you pay or agree to pay for the bonds?

Ans. I could not say exactly to the cent, but think it was between sixty-eight and seventy.

11th. Was there or not any contract made between you as cashier of the bank and Townsend in reference to the purchase of the bonds? If there was, tell what the contract was.

Ans. We believed the bonds would depreciate in value and agreed to return him his bonds at the price we bought them at or less should he not be satisfied to let the trade remain.

12th. At the time the negotiations for the sale of the bonds was pending between you and Townsend, state whether or not the president or directors of the bank had any knowledge or information of the negotiation.

Ans. Mr. W. F. Browder, who, I think, was then president, knew of the negotiation and, I understood at the time, urged Dr. Townsend to make the trade.

13th. From whom did you get this understanding? State, if you recollect.

Ans. I think it was Mr. Browder who told me. I know I had frequent talks with him about it.

14th. State whether or not the Logan County National Bank was engaged in business, the character of bonds mentioned about that time, and, as cashier for the bank, whether or not you were buying them.

56 Ans. It was and I was.

15th. If you can recollect any bond bought from other parties tell who.

Ans. I now cannot recollect all the parties' names, but remember that John W. Caldwell was one of the parties. My remembrance is we bought two thousand dollars' worth from him, as well as various amounts from different parties.

16th. State whether or not you have had access to the books of the bank since your paralysis and whether or not you rely upon memory for statements of particulars.

Ans. I have not had access to the books of the bank since my paralysis, but I rely principally upon my recollection.

17th. State whether or not at the time you bought Townsend's bonds, as before stated, the president or directors of the bank made any objection to the purchase or refused to ratify your act.

Ans. None that I ever heard of or believe.

18th. State whether or not the president or directors knew the purchase had been made at the time it was consummated or shortly thereafter.

Ans. They did, especially so far as Mr. Browder was concerned.

Cross-examined by attorney for defendant, JNO. M. PORTER, Esq.:

1st. Upon what date was the contract between you and Dr. Townsend made and who was present at the time?

Ans. I do not remember the exact date, but think it was
57 in June; do not remember that any one was present but him. I think I talked to Mr. W. K. Rayburn about the matter and got him to tell the Dr. to come up.

2nd. Was not the agreement between you and Dr. Townsend made in one of the rear rooms of the bank in absence of all the officers and employees of the bank?

Ans. I will not be positive. I quite frequently talked to parties in the directors' room about negotiating loans and other business connected with the bank, such as buying bonds, stocks, &c.

3rd. Did you pay Townsend for the bonds bought of him at the time and upon the date of purchase?

Ans. My recollection is that I credited him with the amount, and that he checked it out.

4th. Did you credit him with the proceeds on the date of the purchase?

Ans. My recollection is I did when he delivered a part of the bonds which we did not have on special deposit. Whether it was on the day we traded with him or not, I don't know, but think it was on the day I traded or a few days thereafter.

5th. Is it not true that the bonds of Dr. Townsend were given over to you to forward to Louisville, Ky., to sell, and that he was to have benefit of the proceeds of the sale, and is it not a fact that Townsend did not receive credit of the proceeds until you sold the bonds in Louisville and had proceeds remitted to you?

58 Ans. It is not true that there were any conditions other than I have named, unless, possibly, I was not to credit him so he wouldn't draw the money out till after they were reported sold. I sent the bonds b'o't of him with bonds of other parties.

6th. Did not the Logan County National Bank, in the conduct of its business as a banking corporation, keep a general ledger book?

Ans. It did.

7th. Did it not during the year of 1879, and embracing the month of June, 1879, keep an account in the general ledger, called and designated "the stock and bond account?"

Ans. I think, possibly, it did.

8th. Does not that account embrace and show the entire transaction had by the bank with parties pertaining to the purchase and sale by the bank of stock and bonds?

Ans. It does not.

9th. What other book kept by the bank shows such transaction on the part of the bank?

Ans. It was intended to enter them principally to that account, but was sometimes charged direct to the particular bond account to which the transaction belonged, sometimes to an account called "funds in transiter," or sometimes to my individual account until condition incident to the trade had been fulfilled.

10th. Why was it, if there was an account "stock and
59 bonds" kept to show the bank's transaction in such securities, that all its business relating to such transactions were entered on said account?

Ans. The only reason that I can give is that it was not desired to enter on that account any but completed transactions.

11th. Do you mean to say there were something incomplete in regard to sale of Townsend bonds, or was the purchase of his bonds entered upon the account before alluded to?

Ans. As to this transaction with Dr. Townsend, if it was not entered to the "bonds and stocks account" it was for some good reason at the time. I think it probable that I didn't do it; if I did not, because I didn't credit him then and charge that account, was because I didn't want him to draw so large an amount till I had got credit for it in Louisville, where I sent the bonds for sale.

12th. Is it not a fact that you passed the proceeds of his bonds to your own individual account, and then passed the same from your individual account to his account?

Ans. I do not remember; it was an oversight if I did.

13th. Did any of the bonds you say you bought find an entry and go on the stock and bond account?

Ans. I am not positive that they did.

14th. Did they not all appear upon your individual account kept in a different book, namely, in the individual ledger?

Ans. The account kept in my name on the general book,
60 if such there was, was not my individual account *per se*, but only a convenience account for the benefit of the bank.

15th. But your individual account was kept in the individual ledger, was it not?

Ans. It was, for convenience in dividing accounts, kept in the individual book in the name of Hugh Barclay, Jr. "Hugh Barclay, Jr., agent" (representing R. R. receipts I bought), and two accounts kept respectively in my name as trustee for Mrs. Mary Curd and Mrs. Fannie E. Morton.

16th. Upon your different accounts were entered the transactions relating to each respectively, were they not?

Ans. Not altogether so; sometimes, as I say, I entered items to the Hugh Barclay, Jr., account as a matter simply of convenience to the bank.

17th. Is it not a fact that you sold, in Louisville, Ky., at one time in June, 1879, about $30,000.00 in Logan county bonds, among which were the Townsend bonds, and did you not pass to your individual credit, on the individual ledger, the proceeds of the sale of this lot of bonds?

Ans. I did sell about that time. (I don't remember the exact date) neither do I remember whether they were entered to my account or not; if so, I think it was for the purpose of getting the numbers of the various bonds sold, as sometimes they were reported by my agent, at Louisville, as so many bonds sold, not particularizing the number or size of the bonds sold.

61 18. Were not the books of the bank kept by your direction and under your supervision as cashier during June, 1879, and entries made according to your direction?

Ans. They were under my general supervision all the time I was cashier and president, but I did not direct all the entries by a good deal.

19th. What was the consideration for the purchase you say you made of Dr. Townsend; what was to follow from it in way of profit or otherwise?

Ans. I do not recall that I promised him anything more than the price made, but advised him to sell because I thought the bonds would decline, and if he wanted to he could buy them in at a lower price.

20th. Was the contract you say you made with Townsend reduced to writing?

Ans. I am not positive what kind of writing, if any, I gave him, but think it likely if I did give him any it was only on a memorandum tablet that I usually carried.

21st. Did you not, about 18 months after the transaction, namely, about latter part of 1880 or early part of 1881, give to Dr. Townsend, at the Forst House, in Russellville, Ky., a writing then signed by you to the effect that you gave him a written statement of the transaction upon the day of the purchase by you of the bonds from him?

Ans. I gave him a written statement about the time you mention, but don't remember that I stated in that note I had theretofore given him a statement of the transaction.

62 22nd. About the date of the purchase of Towsend's bonds and prior thereto is it not a fact that you and Townsend were engaged in an effort to depreciate the price of Logan county bonds,

and in order to better succeed in that effort did you not with his aid place on the bond market in Louisville said bonds in large amounts?

Ans. I proposed by getting his bonds to interest him in not encouraging any "bull" movement in the bonds in case they declined. I did place on the market the bonds I got from him with others I got from various sources to the amount of about $40,000, and think likely I told him such sale would have a tendency to depress the bonds.

23rd. When did you cease to be cashier of the bank?

Ans. July or August, 1879, I think.

24th. Who was your successor?

Ans. W. F. Barclay.

25. Did you notify him as to the purchase of Townsend's bonds and the terms of sale?

Ans. I am not positive about so notifying him especially about it, but think pretty sure that I had numerous talks with him about the transaction that led to the purchase of Townsend's bonds.

26. Was anything ever said to you by Townsend on the subject till about the time you gave him a statement at the Forst House in Russellville?

Ans. From the time of the transaction to that time I may have casually mentioned to him, I cannot now recall.

27. Did not W. F. Barclay, in fall of 1880, give you the first notice of Dr. Townsend's claim, and was not that notice to the effect Townsend wanted to see you on an individual business
63 matter between you and him?

Ans. W. F. Barclay first wrote me a note about the demand of Dr. Townsend about the time you mention; that was the first time I had heard of the transaction since it happened, but do not recall that he said that the Dr. wanted to see me on any private business.

28. Did you then notify W. F. Barclay, cashier, that the bank was the party that was responsible and not yourself, or that the purchase was made by the bank and not by you as an individual?

Ans. I do not remember the nature of the reply I made to his note.

29. Did you not have a conversation with W. W. Lyles, at St. Joseph's Infirmary, in city of Louisville, Ky., in the fall of 1882, in which you told him that Dr. Townsend had no claim or case against the bank, and that if you had remained well and in charge of the bank's affairs he never would have sued, or in substance the above?

Ans. I do not remember ever having said that; think it possible that I may have said that, notwithstanding the opposition, if I had remained well I would have made a successful transaction of the affair.

30. Did you not, at the time and place named in the question next above, say further to W. W. Lyle that Townsend got scared when the bonds began to decline in price and refused to buy back and took his money and went into a tobacco speculation with it?

Ans. I do not so remember.

64 31. What is the state of your feeling against the Logan County National Bank and those connected with it as officers and financially interested in the bank?

Ans. My relations, so far as I know, are good. I naturally felt somewhat incensed against certain men connected with said bank, but am trying to forget the past and do not think it influences my answers herein.

32. Have you not expressed a purpose to do all in your power to injure and cripple the bank and those financially interested in it?

(Question objected to by the plaintiff.)

Ans. I do not remember having so expressed myself. I certainly do not so feel now.

Re-examined by plaintiff's attorney:

1st. Was there any conspiracy or collusion between you and Townsend in regard to the bonded debt of Logan county? And please state what object the bank had, if any, in purchasing the bonds, and whether or not the bank wanted control of the bonded debt.

Ans. The bank wanted control of the bonded debt and considered it a point to get Townsend's bonds because he was a citizen of the county and because he had a good lot of bonds. There was no shadow of conspiracy between us unless the foregoing can be construed into a conspiracy.

HUGH BARCLAY, JR.

65 *Notary Public's Certificate to Deposition of Hugh Barclay, Jr.*

STATE OF INDIANA, } ss:
Marion County, }

I, Charles C. Hectman, a notary public in and for said county and State, hereby certify that the foregoing deposition of Hugh Barclay, Jr., was taken before me at the time and place stated in the caption; that said witness was duly sworn before giving it; that it was written and subscribed by him in my presence; that the plaintiff was present by himself and his attorney, and the defendant by its president, cashier, and attorney.

Given under my hand and seal this 5th day of February, A. D. 1883.

[SEAL.] CHARLES C. HECTMAN,
Notary Public.

Oral Testimony of H. Barclay, Jr.

(Oral testimony of Hugh Barclay, Jr., for pl'ff.)

In addition to said deposition, said HUGH BARCLAY, Jr., being present at the trial, testified as follows:

At the time I gave the paper to Townsend at the Forst House and about that time my feelings were not unfriendly towards the bank

and its officials, though I felt somewhat hurt at the treatment of some of them. I wrote about that time the letter here shown me. It was written to W. F. Barclay, the cashier of the bank at that time.

(*Letter Marked "7" and Made Part of Hugh Barclay Jr.'s Testimony.*)

W. F. Barclay, Esq.:

You have seen fit to domineer over me in my helpless con-
66 dition until patience ceases to be a virtue. Such humiliation
I cannot and will not stand. I have to-day mailed to the Bank of Russellville my note at 30 days for $200 to send to Hot Springs, where I had long ago promised it. I had to borrow money to leave Hot Spring on; left my hotel, doctor's, and other bills unpaid, amounting in all to $250. If I get $200 from the bank of R. I can arrange balance. I have arranged to have my horse and carriage sold on square on county court day, and hope then to be in funds to meet my note, as I long since determined to pay every dollar I justly owed. I have means in shape of bonds and stocks to do it with; but as you and that damned bank have seen fit to try to heap one disgrace on another on me, I could stand it no longer. I have determined to let matters take their own course. I know that I have done no wrong, defrauded no one or thing out of a cent, and if bank can do without me I certainly can do without you and it, and intend to do so. Hoping this and intending it shall end all communications between us, and that you and yours may soon suffer that disgrace, penury, and want your damn machinations and frauds sought to work on me; that your infernal carcass may be wrapped in the cold embrace of seas of thick-ribbed ice, blown about the world in the viewless winds, or worse than worst of those that imagine howlings and awful things; that you and yours may come to the most abject and miserable beggary and I be blessed with millions for the pleasure of refusing you any assistance whatever; that you may finally die, rot, and go to hell and suffer the most excru-
ciating torments that can be invented by the damnest damned
67 of 10,000 devils in hell. The excitement occasioned by the
attempted damned disgrace attempted by Caldwell, Browder, you, and the damn bank in kicking me out of my positiou are not and never will, I trust, be forgotten. I say I believe it one of the causes, if not the prime cause, of my present affliction. I expect to work now as assiduously against the bank, you and them, as I ever worked for them.

HUGH BARCLAY, JR.

(*Reference Made to W. K. Raybourn's Deposition.*)

Plaintiff next read the deposition of W. K. RAYBOURN as follows. (See page 25 of this Record.)

Plaintiff then rested his case; and thereupon the defendant moved the court to instruct the jury peremptorily to find for the

defendant, which motion was overruled by the court; to which ruling of the court the defendant at the time excepted and still excepts.

The defendant thereupon introduced the following witnesses, who testified for the bank:

(*Testimony of W. F. Browder for Def't.*)

W. F. BROWDER testified:

"I was president of the Logan County National Bank in June, 1879, and before and after that month. The bank was not at that time or any time engaged in buying or selling Logan county bonds. The bank only bought one bond that year. The bank did not buy Townsend's bonds or empower Hugh Barclay, Jr., to do so or even knew that he had bought them until after his demand on December 14, 1880, after Hugh Barclay, Jr., gave him the paper filed in the petition. The bank was not desirous to get control of the
68 bonded debt of the county and did not traffic in the bonds. I have no recollection of any conversation with R. P. Townsend on the subject at any time. I will not say that I did not have a talk with him, as everybody was talking about bonds at that time; but, if so, I have no recollection of it. Hugh Barclay told me that he had bought Townsend's bonds. He told me this the day he bought them. The bank never instigated or procured any articles to be written to depress the bonds. Hugh Barclay, Jr., was engaged in such an effort on his own account to depress the bonds and to prevent a levy by the county court and fell out with me and other persons connected with the bank because he could not enlist us in the same effort. This is the grounds of his ill-will towards me today.

(Cross-examined:)

I did not attend to the private business of Hugh Barclay, Jr., but was before June, 1879, intimate with him and had a pretty good knowledge of his private affairs. I have no recollection of writing for the town paper any article on the subject of the bonds. I frequently wrote for papers, but recall no such article. I remember that Jim Sam. Flowers and some other gentleman came into my office on one occasion and wanted me to revise or dress up an article of some sort they had written on the subject; never at any time wrote any article for the bank on the subject and never spoke to a magistrate to influence his vote against a levy. I had no knowledge of any transaction between Hugh Barclay, Jr., eitheir individually or for the bank, and Townshend in reference to Townshend's bonds until the 19th of June, 1879, the day the trade was made, and
69 not until it was made and told me by Hugh Barclay, Jr. The paper shown me is in my handwriting. I wrote it, I think, for Hugh Barclay, Jr., on the eve of his departure for Louisville. He called them out from out the books and I wrote them

down for him. I suppose the paper was written at the time of its date, June 3, 1879. I have no recollection of this data, except from what occurs here and the books. This paper purports to be a list of Logan county bonds taken to Louisville by Hugh Barclay, Jr. The bank did not replace him or rebuke him for taking out these bonds, because he said he had authority from the parties whose names are written on the paper to sell their bonds whenever he thought proper to do so, but that he left others in the bank because he said the owners thereof had not given him power to sell them, as was the case with the others. The bank had no authority to rebuke him for taking bonds, as he said he had authority to sell the bonds from the owners. The bank did not buy the bonds of J. W. Caldwell. These bonds were sold by Hugh Barclay, Jr. He was trustee and agent for several of the parties whose names appear on the paper shown me. The pencil-marks on said paper were not written by me. I wrote all on said paper except the pencil-marks and the ink-marks showing them credited to the accounts of the owners of the bonds.

(Attach original paper "No. 8," as per agreement. The clerk will retain a copy of it.)

This paper ("8") is correct, so far as written by me. It was generally known that H. Barclay, Jr., was engaged in an effort to depress the bonds in the market. I made no objections to his
70 doing so. It has the effect to depress the market to flood it with bonds. I do not know that the bank gave any authority to H. Barclay, Jr., to take its bonds named in paper (8) to Louisville. I made no objection. He was cashier and custodian of the deposits and funds of the bank. The bonds were deposited with the bank and not with Hugh Barclay, Jr., individually, but said Hugh Barclay, Jr., claimed to have authority from the owners of these bonds on this paper to sue and to do with as he chose.

Attached to and sent with this record, per agreement of parties, a certified copy taken and filed with the papers.

Attest: THOS. B. HARRISON, *Clerk.*

Logan county O. & R. bonds taken to Louisville by H. Barclay, Jr., June 3, 1879:

D. Morton, agent, 8, 25, 26, 27, 28, 61, 81, 91, 95, 122, $1,000 each.

Dr. R. P. Townsend, 247, 248, 249, 254, $1,000 each; 277, $500; 294, 295, 349, 354, 393, 394, 395, 396, 427, 428, 437, 350, 351, $100 each.

H. Barclay, Jr., trustee of Mrs. J. Cap. Morton, 1, 2, 57, $1,000 each; 210, 238, 239, 259, $500 each; 45, 47, 48, 102, 103, 104, 151, $100 each.

H. Barclay, Jr., trustee for Mrs. Curd, 3, $1,000.

J. W. Caldwell, 218, 219, $1,000 each.

Mrs. H. A. Kurtz, 36, 119, $1,000 each.

N. B. Dudley, 297, 295, $1,000 each; 297, 298, $500 each.

W. F. Barclay, Odd Fell., 234, 241, $500 each; 267, 268, $100 each.

M. Courts, 258, $1,000; 204, 244, $500 each.

Lo. Co. Nat. Bank, 5, 20, 94, $1,000 each; 228, 255, 128, at $1,000 each; 172, $500.

71 We agree that this paper shall be sent in its present original state as a part of the record to the C. appeals, which shall be sent back, if necessary hereafter. A copy shall be retained by the clerk of this court.

February 2, 1884.

JOHN S. RHEA,
Att'y for Plaintiff.
BROWDER & EDWARDS,
Att'ys for Def't.

Defendant next read the deposition of R. D. BROWDER, as follows:

(*Notice to Take Deposition of R. D. Browder for Defendant.*)

Logan Circuit Court.

R. P. TOWNSEND, Plaintiff,
vs.
LOGAN COUNTY NATIONAL BANK, Defendant, } Notice.

The plaintiff is notified that the defendant will, on Thursday, January 3, 1884, at the office of Lester C. Smith, attorney, on Commerce street, in Montgomery, Ala., between 9 o'clock a. m. and 6 o'clock p. m., proceed to take the deposition of Richard D. Browder, to be read as evidence in the above-entitled cause.

December 26th, 1883.

BROWDER & EDWARDS,
Attorneys for Def't.

(*Officer's Return.*)

Executed on R. P. Townsend December 27th, 1883, by delivering to him a copy of this notice.

R. M. WARDEN, *S. L. C.*,
By J. R. PERRY, *D. S.*

(*Deposition of R. D. Browder, Taken for Defendants.*)

72 The deposition of Richard D. Browder, taken on behalf of the defendant, on Thursday, the 3rd day of January, Friday, 4th, Saturday, 5th, Monday, 7th, days of January, A. D. 1884, at the law office of Lester C. Smith, in the city of Montgomery, in the county of Montgomery and State of Alabama, to be read as evidence in an action between R. P. Townsend, plaintiff, and The Logan County National Bank, defendant, now pending in the Logan circuit court, at Russellville, Kentucky.

MONTGOMERY, ALABAMA, THURSDAY, *January* 3, 1884.

Examination of the witness, R. D. BROWDER, commenced pursuant to notice:

Present: L. C. Smith, Esqr., of counsel for defendant; no one appearing for plaintiff.

Question No. 1 by attorney for defendant. State your age, residence, and occupation.

Ans. My name is Richard D. Browder; I reside at Montgomery, Ala.; I am twenty-seven years old; occupation is that of a book-keeper for Teague, Barnett & Co.

Further examination of this witness adjourned until Friday, January 4th, 1884, at half past nine o'clock a. m.

MONTGOMERY, ALABAMA, *January 4th*, 1884.

The examination of the witness, R. D. BROWDER, now resumed:

Present: L. C. Smith, Esq., of counsel for defendant; no one appearing for plaintiff.

Question No. 2 by counsel for defendant. Where did you reside and in what business were you engaged in 1879?

Ans. I resided in Russellville, Kentucky, and was book-keeper for the Logan County National Bank (located there), the defendant in this action.

73 Question No. 3 by defendant's counsel. How long did you act in that capacity—from what time to what time?

Ans. I was book-keeper for the Logan County National Bank from April 1, 1879, to March, 1880.

Question No. 4. Who was cashier of said Logan County National Bank while you were its book-keeper?

Ans. Until the fall of 1879 Hugh Barclay, Jr., was cashier; from that time until I left, W. F. Barclay was cashier.

Question No. 5. Was or not said Hugh Barclay, Jr., actively or otherwise, engaged in the conduct and management of said bank all the time up to July, 1879?

Ans. He was so engaged up to July, 1879.

Question 6th. What were your duties as book-keeper for the defendant? State the character of the work you actually did as such book-keeper.

Ans. My duty as book-keeper was to keep the individual cash book and ledger and to attend to the collection of the drafts and notes and bills, &c. The books I kept were those on which appeared the individual and private accounts of those dealing with the bank, and also the private accounts of its officers and employees.

Question No. 7. Under whose supervision or direction, if anybody's, did you perform the duties of book-keeper for the defendant?

Ans. Under the direction and supervision of Hugh Barclay, Jr., while he was cashier, and of W. F. Barclay while he was cashier.

Question 8. State whether or not all, and, if not all, what, entries were made by you on the books of said bank by the direction of said Hugh Barclay, Jr.

74 Ans. All entries made in the ordinary course of business, such as crediting up amounts deposited, charging up checks paid, and entering collections and remittances, were made without the special direction of the said Hugh Barclay, Jr. All other entries than these, from April 1, '79, to about August or September 1, '79, when said Hugh Barclay, Jr., ceased to be cashier, were made by the special direction of the said Hugh Barclay, Jr.

Question 9. Examine the book now handed you and styled "Individual Cash" at the top of the back and having the words "Logan County National Bank" printed in gilt letters at a point below on the back of the same, and having the words "June 23rd, 1877, to June 20th, 1879," written on white paper and posted at bottom of said back, and state whether you ever saw said book before; and, if so, where and what is it.

Ans. I have examined the book described and handed me. I have seen the same before at Russellville, Ky., in the Logan County National Bank. It is the individual cash book which was kept by me as book-keeper of said Logan County National Bank in April, May, and June, 1879.

Question 10. State whether or not said book contains a correct record of all the transactions entered by you therein as book-keeper as aforesaid.

Ans. It does.

Question 11. Examine said book and state whether or not you made, as book-keeper aforesaid, all or any of the entries therein from page 591, beginning under the date of Thursday, May 1st,

75 1879, and ending with the close of said book, under date June 20th, 1879.

Ans. All entries in said book from said page 591 to close of book were made by me except the following: On page 598 the entries on lines 13 and 33, and on page 599 from line 17 to line 30, inclusive, and on page 612, line 21; on page 613, line 33, and page 634, on line 44.

Question 12. By whose directions did you make the said entries?

Ans. Said entries were made under the general direction of H. Barclay, Jr.

Question 13. Examine page 636, under date June 17, 1879, the 5th entry from the top, which is in words and figures as follows: "541, Barclay, H. Jr., Banking Co., $21,558.25," and explain fully

what it means, the effect of the said entry, and the relation of the amount of money there stated to the names "H. Barclay, Jr.," and "banking Co."

Ans. The entry means that the amount of money there stated, $21,558.25, is to be placed to the credit of H. Barclay, Jr., and that this amount of money was received in some way from the "banking company," by which is meant the Louisville Banking Company, at Louisville, Kentucky. The Logan County National Bank had an account with said Louisville Banking Company, which account was kept on the "general" books of the bank and it does not appear on the "individual books," which were kept by me, further than is shown by the entry enquired of. This amount was carried to the individual credit of H. Barclay, Jr., on page 541 of the "individual ledger" of said defendant bank, which was kept by me.

76 Question 14. Do you know to what transaction that entry refers? If so, state.

Ans. I don't know to what transaction that entry refers.

Question 15. By whose direction was said entry made?

Ans. It was made by special direction of said H. Barclay, Jr.

Question 16. Examine, on page 638 of said book, under date of June 20, 1879, about the middle of said page, the first entry thereon, in words and figures following: "541, Barclay, H., Jr., by banking Co., 3,212.50," and explain the effect and meaning of the same.

Ans. It means that on June 20th, 1879, H. Barclay Jr.'s private account, on page 541 of the "individual ledger," was to be credited with the $3,212.50 which had been received in some way from the Louisville Banking Company or charged to them on the general books of the said Logan County National Bank, and Barclay's private account, on page 541 of the "individual ledger," is so credited.

The further examination of this witness is adjourned until Saturday, January 5th, 1884.

MONTGOMERY, ALABAMA, *Saturday, January 5th*, 1884.

Examination of the witness, R. D. BROWDER, resumed pursuant to adjournment:

Present: L. C. Smith, Esq., of counsel for defendant; no one appearing for plaintiff.

Question 17. What banking company is referred to in that entry and what relation, if any, did it occupy to the defendant bank?

Ans. The banking company referred to was the Louisville Banking Company of Louisville, Kentucky. It occupied
77 the relation of correspondent at Louisville to the defendant bank.

Question 18. Examine on page 639 of said book, and under date of Friday, June 20th, 1879, about the middle of said page, the first two entries made there, viz, "541, Barclay, H., Jr., to R. P. Townsend, for $6,000 Logan county bonds; 4,140 and 6,800 Logan county bonds, 4,624," and state if you made said entries as book-keeper, and explain fully the meaning and effect of said entries; the relation

said figures expressing the amounts bear to the names "Barclay, H., Jr.," and "R. P. Townsend," and state what the figures 541 are designed to represent.

Ans. I have examined the entries enquired about. They were made by me. They mean that the Logan County National Bank paid to R. P. Townsend 4,140.00 for 6,000.00 Logan county bonds, and also paid to said Townsend 4,624.00 for 6,800 of Logan county bonds, and that both of these payments were made by the bank for H. Barclay, Jr., and were charged to H. Barclay Jr.'s account on the individual ledger. The figures 541, standing to the left of said entries, designate the page on the individual ledger on which said entries are posted.

The further examination of the witness, R. D. Browder, is now adjourned until Monday morning, January 7th, 1884, at 10 o'clock.

MONDAY, *January* 7, 1884—10 o'clock a. m.

Examination of witness, R. D. BROWDER, resumed:

Present: L. C. Smith, Esq., of counsel for defendant; no one appearing for plaintiff.

Question 19. By whom were you directed to make said entries?

Ans. These entries were made by the special direction of
78 Mr. H. Barclay, Jr. He came to my desk and looked on while I was making the entries and saw that I made them as directed by him.

Question No. 20. Examine, on page 638 of said book, under date of Friday, June 20th, 1879, the third and fourth entries from the bottom of said page, as follows:

"367, Townsend, Dr. R. P., 6,800 Logan Co. bonds, 68c., 4,624.
"Same, 6,000 " " " 69c., 4,140,"

and explain the purport and effect of said entry, and whether you made said entries; and, if so, at whose instance.

Ans. These entries mean that the private account of Dr. R. P. Townsend was credited with $4,624 for 6,800 Logan county bonds at 68c. and $4,140 for 6,000 Logan county bonds at 69c., and these amounts were posted to his credit on the individual ledger, page 367. I made said entries by special instruction of H. Barclay, Jr., and at the same time that I made the entries testified to and answered to the 18th question. These entries and those asked about in the 18th question refer to the same transaction, and the account of Townsend is credited with the amounts as stated, and the private account of Barclay is debited with the same amount.

Question No. 21. State what connection, if any, exists between the entries enquired of in the 18th question and those enquired of in the 20th question.

Ans. Those entries refer to the same transaction and were made at the same time.

Question No. 22. Explain what these entries, when taken together, mean.

Ans. They mean that the account of Dr. R. P. Townsend
79 was credited with the amount stated for Logan county bonds sold to H. Barclay, Jr., and that said H. Barclay Jr.'s private account on the individual ledger was debited with the same amount for said bonds.

Question No. 23. Please copy from said book all the entries aforesaid on a separate piece of paper and make said copy a part of your deposition and the answer to this question, giving the page of the book and date of each entry.

Ans. I have made copies of all the entries aforesaid and herewith attach said copy, marked "Exhibit A" No. 1 and No. 2 and No. 3 as a part of this answer and deposition.

Question No. 24. State whether or not said copies are true and correct transcripts of what they purport on their face to be.

Ans. They are.

Question No. 25. Examine the book now handed you and styled in gilt printed letters on the binding thereof "Individual Ledger No. 3," and with the words "Logan Co. Nat'l Bank, Russellville, Ky.," in gilt letters below, and state if you ever saw said book before.

Ans. I have examined the book asked about and have seen it before.

Question No. 26. Where did you see it and whose book was it and for what was it used there?

Ans. I saw it in Russellville, Kentucky, in the office of the Logan County National Bank. It belonged to the Logan County National Bank and was the book on which the private accounts of persons dealing with the bank were kept, and to it were posted all the entries made on the "individual cash" book before described.
80 All the entries on said ledger were first made on said "individual cash" book and posted thence to said ledger.

Question No. 27. State whether or not as book-keeper of said bank you made any entries on said ledger.

Ans. As book-keeper of said bank I did make entries on said ledger.

Question No. 28. Examine the account on page 367 of said book, the first account at the top of that page, and state what it is, whose it is, and what it means.

Ans. That is a private account of Dr. R. P. Townsend. It shows the amounts deposited with the bank and for which he received credit and the dates thereof, and also the amounts and dates of payments by the bank for his account on checks or otherwise.

Question No. 29. State whether or not you kept that account as book-keeper or any part of it.

Ans. On the left-hand or debit side of said account, beginning July 29, 1879, and ending February 18, 1880, the entries were made by me. The four entries on the right-hand or credit side of said account—two on June 20th, one on August 2d, and one on November 6th, all in 1879—were made by me. I kept said book and said accounts while I was book-keeper for said bank.

Question No. 30. Examine the following entries on the right-hand or credit side of said account, viz:

"1879, June 20. By Logan Co. bonds, 638, 4,624.
" " " " " 638, 4,140,"

and explain the meaning and effect thereof—writing, figures, and all. To what does the "number 638" there refer?

81 Ans. I have examined the entries. They mean that the account of Dr. R. P. Townsend was credited, on June 20, 1879, with $4,624 for Logan Co. bonds, and $4,140 for Logan Co. bonds, and that the original entry of the transaction is posted from page 638 of the "individual cash" book, where it was originally made. The number "638" refers to the page on the "individual cash" book, from which the entry was made.

Question 31. Examine on page 541 of said ledger, on the left-hand or debit column, the 14th and 15th entries from the top, in these words and figures, viz:

"20. Townsend for Logan Co. bonds, 639, 4,140.
" " " " " 639, 4,624,"

and state whether you wrote them, and explain their meaning and effect.

Ans. I have examined said entries. They are on the debit side of the private account of H. Barclay, Jr., on the "individual ledger." I wrote them. They mean that on the 20th of June, 1879, there was paid to Townsend for Logan county bonds $4,140 and $4,624, and that these payments were made for the private account of said Barclay, and that the original entries of the transaction were made on page 639 of the "individual cash" book.

Question No. 32. Whose account is kept on page 541, and what does said account mean?

Ans. The private account of H. Barclay, Jr., was kept on said page. The items on the left-hand or debit side of said account are those of amounts paid for or to said H. Barclay, Jr. The items

82 on the right-hand or credit side are those of moneys paid to the bank by or for the account of said H. Barclay, Jr., and the whole account is a record of the private and personal transactions of said H. Barclay, Jr., with and through said bank during the period embraced between dates June 3, 1879, and August 5, 1879.

Question No. 33. Was the Hugh Barclay, Jr., there mentioned the same person who was the defendant's cashier while you were book-keeper for it in 1879?

Ans. He was.

Question No. 34. By and under whose direction did you make the entries asked about in the 30th and 31st questions?

Ans. The entries enquired about in those questions are on the ledger, to which they have been posted from the "individual cash" book. The posting on the ledger was not made under the direction of anybody, but were merely copies of the entries made on the cash

book, which entries—on the cash-book—were made, as before stated, by the direction of H. Barclay, Jr.

Question No. 35. Have you any pecuniary interest in the result of this suit?

Ans. I have none.

Question No. 36. State how long you have been living in Montgomery, and how long you have been in the employ of the said Teague, Barnett & Co. as their book-keeper?

Ans. I have lived here in Montgomery, Ala., since October 6, 1880, and have been with said Teague, Barnett & Co. as book-keeper since July 1, 1881.

R. D. BROWDER.

83 (*Notary Public's Certificate to Deposition of R. D. Browder.*)

I, Edward C. Elmore, a notary public in and for the city and county of Montgomery, in the State of Alabama, do hereby certify that the foregoing deposition of Richard D. Browder was taken before me at the times and place mentioned in the caption; that said witness was duly sworn before giving it; that it was written by me in his presence and read to and subscribed by him in my presence. Lester C. Smith, Esq., appeared as attorney for defendant and was present during the taking of said deposition. No one was present on behalf of the plaintiff. I further certify that the examination of said witness was adjourned on Thursday, January 3, 1884, to Friday, January 4, 1884, and on Friday, January 4, 1884, to Saturday, January 5, 1884, and on Saturday, January 5, 1884, to Monday, January 7, 1884, as appears in said deposition.

Witness my hand, at Montgomery, Ala., this 7th day of January, A. D. 1884.

[SEAL.] E. C. ELMORE,
Notary Public, Montgomery County, Alabama.

(EXHIBIT "A" No. 1. Filed with R. D. Browder's Deposition.)

"EXHIBIT A."

On page 636 of "individual cash" book.

636. June, 1879.

TUESDAY, *June* 17, 1879.

541. Barclay, H. Jr., Banking Co. ---------- 21,558 25

84 On page 638 of "individual cash" book.

638. June, 1879.

FRIDAY, *June* 20, 1879.

541. Barclay, H. Jr., by banking Co. ---------- 3,212 50
367. Townsend, Dr. R. P., 6,800 Logan Co. bonds, at 68c.. 4,624 00
" " 6,000 " " " " 69c.. 4,140 00

On page 639 of individual cash book.

639. June, 1879.

FRIDAY, *June* 20, 1879.

541. Barclay, H. Jr., to R. P. Townsend for 6,000 Logan county bonds 4,140 00
To do., 6,800 Logan county bonds 4,624 00

Exhibit "A" No. 1 to deposition of R. D. Browder in answer to 23rd question.

E. C. ELMORE,
Notary Public.

85 Hugh Barclay, Jr.

June	3.	To * * *			1879.		
		" * * *			June	13.	By * * *
	20.	To Townsend for				17.	" banking Co. 636 21,558 25
		Logan Co. bonds.	639	4,140		19.	" " "
		" do. for do.	"	4,624		20.	" banking Co. 638 3,212 50

Exhibit A. No. 2 to deposition of R. D. Browder in answer to 23d question.

E. C. ELMORE,
Notary Public.

Dr. R. P. Townsend.

1879.
June 20. By Logan Co. bonds 638 4,624
" " " " " " ..... " 4,140

Exhibit A No. 3 to deposition of R. D. Browder in answer to 23d question.

E. C. ELMORE,
Notary Public.

86 (*Testimony of W. E. Wilson for Defendant.*)

W. E. WILSON next testified that he kept books in the Logan County National Bank in June, 1879; kept an account in said books called "bond and stock account," where all transactions in stocks and bonds by and for the bank were recorded and kept. No bond bought, according to this account which is now before me, in June 19th, 1879, of R. P. Townsend or any one else; only one bond bought that month, and that was of Cabe Price. Hugh Barclay, Jr., was cashier in 1879, when I kept books there. There is no entry of transaction in bonds in this account in June 3rd, 1879, either.

(*Testimony of W. F. Barclay for Defendant.*)

W. F. BARCLAY next testified:

I became cashier of Logan County National Bank some time in July or August, 1879, I think. I made the pen and ink marks

across the paper shown me and heretofore shown W. F. Browder after I became cashier. Hugh Barclay, Jr., made the pencil-marks and figures on said paper. Hugh Barclay, Jr., told me that he had authority to sell the bonds of David Morton, and David Morton also told me the same thing. These bonds are on the paper shown me. The bonds of the bank mentioned on said paper were not sold by Hugh nor by any one at that time. The bonds of M. Courts were simply exchanged. R. P. Townsend wrote me several letters in reference to some business he said he had with Hugh Barclay, Jr., my brother, and I answered his letters.

(*Letter Marked "9" and Made a Part of W. F. Barclay's Testimony.*)

87 11, 10, 1880.

Dr. R. P. Townsend, Adairville, Ky.:

I will be at home Thursday (D. V.) and ready to confer with you in regard to Hugh's interests. While everything that was not of an imperative nature has been held in obeyance, I have been representing him in all matters requiring attention, and will do so in this. Should it prove to be a matter in which I cannot act we can consider the advisability of consulting him.

Resp'y W. F. BARCLAY.

(*Letter Marked* 10 *and Made Part of Testimony of W. F. Barclay.*)

11, 22, 1880.

Dr. R. P. Townsend, Adairville, Ky.:

Upon reflection, I thought best to refer the matter concerning which you came to see me to Hugh himself and did so. I suppose you have probably heard from him in regard to it. He has not advised with me and I do not know whether he has written you or not. Presuming upon his doing so, I have refrained.

Yours truly, W. F. BARCLAY.

(*Letter Marked "11" and Made Part of Testimony of W. F. Barclay.*)

12, 8, 1880.

Dr. R. P. Townsend, Adairville, Ky.:

88 Your favor of 7th inst. received. I wrote you Nov. 22, advising you that I had notified Hugh of your demand. I did this thinking that his memory of the transaction might throw some light upon it. We have finally been forced to the conclusion that softening of the brain has set up in his case, and that we can no longer regard him as responsible. The bank has occupied this attitude toward him for some weeks and his checks are no longer honored. No legal steps have been taken to ascertan his condition or to appoint a committee-man to take charge of his affairs. I think I may venture to predict, however, that no settlement of your claim, if made now by him, would be recognized by his family, nor that the same will ever be voluntarily allowed.

Very truly, W. F. BARCLAY.

He also came up with W. K. Rayburn and wrote out his claim. Rayburn also wrote his statement at the said time. He asked me to lay the claim before my brother, Hugh Barclay, Jr., which I did by letter, as here shown.

(*Letter Marked "12" and Made Part of Testimony of W. F. Barclay.*)

Hugh Barclay, Jr.:

Nov. 11*th*, 1880.

BRO.: Dr. R. P. Townsend has demanded of you, through me, $12,800 in Logan Co. bonds at 69 cts., claiming that you guaranteed him against loss if he would sell at that. The bonds are now at a premium in Louisville. The claim is utterly preposterous and absurd and no court in christendom would entertain it. What shall I tell him? Your note of this date, addressed to this
89 bank, has been received. Until there is an adjustment of affairs I cannot honor your checks further than to pay your expenses. Mrs. Felts has an interest in the assets of Barclay's bank and I cannot become personally liable by permitting you to squander it.

Your brother, W. F. BARCLAY.

Townsend never mentioned the bank to me in his letters, in conversation, or otherwise, but always spoke of his claim against Hugh Barclay, Jr., until after he was informed that Hugh's estate was insolvent and until after he got the paper from Hugh, Dec'b'r 14th, 1880. He then came and made demand for the bonds. I told him I would call the directors together and let them take action upon it. I afterwards wrote him that I had done this, and they declined to pay his demands. He never made any demand at any other time. At the time he came up with Rayburn and gave his statement he told me that Hugh wanted his bonds, so as to get his influence with Aaron Burr, a magistrate of his district, whom he said Hugh knew had his office with him, and that at the time the bonds were sold he agreed to use his influence with said Burr to get him to vote in the county court against a levy.

(Cross-examined:)

My feelings toward Hugh Barclay, Jr., have always been and are now kindly and affectionate. When he was seeking to be declared of sound mind in Louisville, after his incarceration in the asylum for the insane I did not nor did his family, to my knowledge, employ counsel to go to Louisville to resist that effort. I was in Colo-
90 rado at the time, but it is my information that counsel went there to resist the application. I think Hugh Barclay, Jr., was of unsound mind when he made the statement to W. W. Lyles, at St. Joseph's Infirmary, in Louisville, in reference to this suit, and was insane at the time he wrote me the letter No. 7.

(Redirect examination:)

I think Hugh Barclay, Jr., was insane at the time his deposition

read in this case was taken, at the time R. P. Townsend got the paper from him, Dec. 14th, 1880, and at the present time. My feelings are those of a brother towards him. He has been supported, wherever he has been, by myself and others of his family. He was on Dec. 14th, 1880, and has been ever since bitter in his hatred towards all those connected with the bank. The directors of the bank in June, 1879, were W. F. Browder, William Bryant, William Trueman, and C. H. Harrison and T. E. Browder. Hugh Barclay, Jr., had been adjudged by a jury to be sane a short while before his deposition was taken. No resistance was made to his application to be passed upon as sound or unsound.

(*Testimony of William Bryant for Defendant.*)

WILLIAM BRYANT next testified:

"I was director of the Logan County National Bank in 1879, including June of that year. The bank was not engaged in an effort to control the bonded debt. It did not buy or sell the bonds or seek to depress the price of the bonds. The bank did not buy Townsend's bonds or authorize Hugh Barclay, Jr., to do so for it. The directors knew nothing of the transaction or demand against the bank until Dec. 14th, 1880."

Cross-examined:

I only say I have no knowledge of those facts. I do not
91 know what was done by H. Barclay, Jr., when I was not present.

(*Testimony of Wm. Trueman for Defendant.*)

WM. TRUEMAN next testified:

That he was a director of said bank in June, 1879. The bank was not engaged in buying bonds itself nor did it give Hugh Barclay, Jr., authority to buy Townsend's bonds or any others. They were not bought for the bank. At one time he (Trueman) inquired how many bonds the bank owned, and learned that it owned three or four and was not dealing in them. It did not seek to depress the bonds or receive any benefit from purchase by Hugh Barclay, Jr., of Townsend's bonds. I did not examine the books and did not know everything that was going on in the bank further than directors generally do. I have no interest in the result of this suit, having sold my stock.

(*Testimony of C. H. Harrison for Defendant.*)

C. H. HARRISON next testified:

That he was director of the bank in 1879 and in June of that year, and that the bank was not engaged in any effort to depress the bonds; did not deal in them; did not buy Townsend's bonds or give H. Barclay, Jr., authority to do so, or know that he had bought

He also came up with W. K. Rayburn and wrote out his claim. Rayburn also wrote his statement at the said time. He asked me to lay the claim before my brother, Hugh Barclay, Jr., which I did by letter, as here shown.

(*Letter Marked "12" and Made Part of Testimony of W. F. Barclay.*)

Hugh Barclay, Jr.:

Nov. 11*th*, 1880.

BRO.: Dr. R. P. Townsend has demanded of you, through me, $12,800 in Logan Co. bonds at 69 cts., claiming that you guaranteed him against loss if he would sell at that. The bonds are now at a premium in Louisville. The claim is utterly preposterous and absurd and no court in christendom would entertain it. What shall I tell him? Your note of this date, addressed to this
89 bank, has been received. Until there is an adjustment of affairs I cannot honor your checks further than to pay your expenses. Mrs. Felts has an interest in the assets of Barclay's bank and I cannot become personally liable by permitting you to squander it.

Your brother, W. F. BARCLAY.

Townsend never mentioned the bank to me in his letters, in conversation, or otherwise, but always spoke of his claim against Hugh Barclay, Jr., until after he was informed that Hugh's estate was insolvent and until after he got the paper from Hugh, Dec'b'r 14th, 1880. He then came and made demand for the bonds. I told him I would call the directors together and let them take action upon it. I afterwards wrote him that I had done this, and they declined to pay his demands. He never made any demand at any other time. At the time he came up with Rayburn and gave his statement he told me that Hugh wanted his bonds, so as to get his influence with Aaron Burr, a magistrate of his district, whom he said Hugh knew had his office with him, and that at the time the bonds were sold he agreed to use his influence with said Burr to get him to vote in the county court against a levy.

(Cross-examined:)

My feelings toward Hugh Barclay, Jr., have always been and are now kindly and affectionate. When he was seeking to be declared of sound mind in Louisville, after his incarceration in the asylum for the insane I did not nor did his family, to my knowledge, employ counsel to go to Louisville to resist that effort. I was in Colorado at the time, but it is my information that counsel went
90 there to resist the application. I think Hugh Barclay, Jr., was of unsound mind when he made the statement to W. W. Lyles, at St. Joseph's Infirmary, in Louisville, in reference to this suit, and was insane at the time he wrote me the letter No. 7.

(Redirect examination:)

I think Hugh Barclay, Jr., was insane at the time his deposition

read in this case was taken, at the time R. P. Townsend got the paper from him, Dec. 14th, 1880, and at the present time. My feelings are those of a brother towards him. He has been supported, wherever he has been, by myself and others of his family. He was on Dec. 14th, 1880, and has been ever since bitter in his hatred towards all those connected with the bank. The directors of the bank in June, 1879, were W. F. Browder, William Bryant, William Trueman, and C. H. Harrison and T. E. Browder. Hugh Barclay, Jr., had been adjudged by a jury to be sane a short while before his deposition was taken. No resistance was made to his application to be passed upon as sound or unsound.

(Testimony of William Bryant for Defendant.)

WILLIAM BRYANT next testified:

"I was director of the Logan County National Bank in 1879, including June of that year. The bank was not engaged in an effort to control the bonded debt. It did not buy or sell the bonds or seek to depress the price of the bonds. The bank did not buy Townsend's bonds or authorize Hugh Barclay, Jr., to do so for it. The directors knew nothing of the transaction or demand against the bank until Dec. 14th, 1880."

Cross-examined:

91 I only say I have no knowledge of those facts. I do not know what was done by H. Barclay, Jr., when I was not present.

(Testimony of Wm. Trueman for Defendant.)

WM. TRUEMAN next testified:

That he was a director of said bank in June, 1879. The bank was not engaged in buying bonds itself nor did it give Hugh Barclay, Jr., authority to buy Townsend's bonds or any others. They were not bought for the bank. At one time he (Trueman) inquired how many bonds the bank owned, and learned that it owned three or four and was not dealing in them. It did not seek to depress the bonds or receive any benefit from purchase by Hugh Barclay, Jr., of Townsend's bonds. I did not examine the books and did not know everything that was going on in the bank further than directors generally do. I have no interest in the result of this suit, having sold my stock.

(Testimony of C. H. Harrison for Defendant.)

C. H. HARRISON next testified:

That he was director of the bank in 1879 and in June of that year, and that the bank was not engaged in any effort to depress the bonds; did not deal in them; did not buy Townsend's bonds or give H. Barclay, Jr., authority to do so, or know that he had bought

them or sold them until demand was made on the bank Dec. 14th, 1880. I had no knowledge of this if it was done. I did not examine the books or know what papers or notes were negotiated. I attended the meetings of the board of directors, and these things were not done when I was there. I have no interest in the result of this suit.

(*Testimony of W. W. Lyles for Defendant.*)

92 W. W. LYLES testified that Hugh Barclay, Jr., at St. Joseph's Infirmary, in Louisville, in the fall of 1882, told him that Dr. Townsend had no claim or case against the bank, and that if he had remained well and at the head of the bank Dr. Townsend never would have brought suit; and also at the same time he told him that Dr. Townsend got scared when the bonds went so low, and drew out his money and sent it to Hopkinsville to buy tobacco.

Lyles further testified that Townsend told him he would see Aaron Burr and induce him to vote against the levy of tax to pay interest on the bonds, and afterwards told him that he had seen Burr and got him to vote against the levy.

(*Testimony of L. C. Garrigus for Defendant.*)

L. C. GARRIGUS was sworn and asked if R. P. Townsend did not tell him, in Adairville, that he was engaged with Hugh Barclay, Jr., in an effort to depress the bonds; that he had sold his bonds, and Hugh was to tell him when to buy back. He declined to answer the question on the ground that Townsend communicated with him as an attorney, and that it was a privileged communication that he claimed. He also said that he (Garrigus) was or had been an attorney for H. Barclay, Jr., and he did not wish to testify on the subject.

The court excused the witness.

(*Testimony of R. P. Townsend upon Being Recalled, &c.*)

Defendant here rested, and plaintiff R. P. TOWNSEND, was recalled by his attorney, and testified that he had not used
93 his influence with A. Burr or any one else to depress the bonds and had not promised to do so; that he had made a demand on the bank for the bonds when he came up with Rayburn, and threatened to sue if they did not pay; made this demand of the cashier, W. F. Barclay; did not know whether Rayburn heard him or not. I took his deposition, but never asked him whether he heard this demand or not. Rayburn was in and out of the bank on that occasion. I did not tell W. F. Barclay that H. Barclay, Jr., wanted my bonds so as to get my influence with A. Burr, a magistrate of my district, whom he said Hugh knew had his office with me, and that at the time the bonds were sold I agreed to use my influence with said Burr to get him to vote in the county court against a levy.

And this was all the evidence given in the case.

And thereupon, at the conclusion of the evidence on both sides, the court gave the following instructions to the jury at the instance of plaintiff; to all of which instructions defendant at the time excepted and still excepts.

(Instruction No. 1 for plaintiff.)

"No. 1." The court instructs the jury that if they believe from a preponderance of the proof that the plaintiff Townsend sold to the defendant, The Logan County National Bank, the bonds mentioned in the petition and the defendant agreed and promised on demand to return the bonds to plaintiff at the price paid or less, and upon demand refused to do so, they must find for plaintiff the difference between the price paid and the value of the bonds at the time the demand was made. Given. R. R.

94 (Instruction No. 2 asked for by plaintiff and given.)

No. 2. The jury must consider all the facts and circumstances proven in this case in making up their verdict, and they are the judges of the weight of testimony and the credibility of witnesses. Given. R. R.

(Instruction No. 3 for plaintiff.)

No. 3. The court instructs the jury that it was the duty of the directors of the bank to acquaint themselves with the affairs of the bank, and if they did not do so it cannot prejudice the claim of plaintiff, provided the contract (if any) was with Barclay for the bank, was known to its president, and no objection made to it in a reasonable time thereafter. Given. R. R.

And the defendant moved the court to give the jury the following instructions:

(Instruction No. 9 asked for by defendant and refused.)

9th. That the defendant is a national banking association, capable of exercising only such powers as are expressly or impliedly conferred upon it by its act of incorporation, and that the power to buy and sell municipal bonds for purposes of speculation or to engage in the purchase or sale of such securities for the purpose of manipulating or controlling their market value is not conferred upon the defendant bank by the provisions of its charter; and that if the jury believe from the evidence that the cashier Barclay paid Townsend the full market value for his bonds and bought them for the sole purpose of enabling him or the bank to manipulate or con-
95 trol the price of said bonds in the market for speculative purposes they must find for the defendant, provided they shall believe that the plaintiff at the time knew that the bonds were to be used for such purposes. Refused. R. R.

(Instruction No. 12 asked for by defendant and refused.)

12th. That the powers and duties of the cashier of the defendant bank are limited and defined by law, and that all persons who deal with him are presumed to know the law, and in this case the jury are instructed that the contract sued on is not such a contract as falls within the scope of the authority of defendant's cashier in the exercise of the ordinary functions of his office, and that unless said contract was made, if made at all by him as cashier, with the knowledge and consent of the board of directors of defendant, or was afterwards, when brought to their knowledge, ratified by said directors in some form, they must find for defendant. Refused. R. R.

(Instruction No. 13 asked for by defendant and refused.)

No. 13. The court instructs the jury that they must find for defendant unless they believe from the preponderance of the testimony that Hugh Barclay, Jr., bought plaintiff's bonds for the bank and agreed for the bank to return said bonds to him at any time thereafter at same price, and that there was some profit or advantage growing out of said trade to the bank, or that it derived some profit or advantage therefrom. Refused. R. R.

Which said instructions the court refused to give; to which ruling the defendant at the time excepted and still excepts.

96 The defendant also asked the court to give the following instructions:

(Instruction No. 3 as originally drawn by defendant's counsel.)

3rd. That the mere fact that Hugh Barclay, Jr., was defendant's cashier when Townsend claims to have sold his bonds as detailed by him is not of itself sufficient to make the bank liable in this action, and that unless they are satisfied by a preponderance of the evidence that Townsend sold his bonds to the bank they must find for the defendant.

(Instruction No. 5 as originally drawn by defendant's counsel.)

5th. That in weighing the evidence of a witness it is the duty of the jury to take into consideration the state of feeling exhibited by him or proven to exist towards the party for or against whom he shall have testified.

(Instruction No. 6 as originally drawn by defendant's counsel.)

6th. That if the jury believe from the evidence that the witness, Hugh Barclay, Jr., was of unsound mind at the time his deposition read on the trial was taken, they have the right and it is their duty to disregard all the testimony embodied in said deposition.

(Instruction No. 7 as originally drawn by defendant's counsel.)

7th. That unless the jury shall believe from the evidence that the plaintiff Townsend demanded of the defendant the bonds mentioned and tendered to the bank the amount of money in payment therefor

equal to the sum which he received for them in June, 1879, they must find for the defendant, unless the defendant by some
97 affirmative act waived an actual tender of the amount to which at the time it was entitled under the agreement alleged by the plaintiff.

(Instruction No. 8 as originally drawn by defendant's counsel.)

8th. That even if the jury shall believe from the evidence that Barclay purchased Townsend's bonds for the bank and agreed that the bank would replace them on demand at the same price at which Townsend sold them, still, unless they shall further believe that said contract was previously authorized or subsequently ratified by the bank, they must find for the defendant.

(Instruction No. 10 as originally drawn by defendant's counsel.)

10th. That while a party in interest may lawfully testify in his own behalf, the fact that he has a pecuniary interest in the result of the trial is to be considered by the jury as affecting his credibility as a witness.

(Instruction No. 11 as originally drawn by defendant's counsel.)

11th. That if the jury believe from the evidence that the plaintiff and defendant or the plaintiff and Hugh Barclay, Jr., in June, 1879, or about that time, were engaged in a joint effort to manipulate the market price of Logan county bonds by controlling or attempting to control or influence the county court of Logan county or any member of that court, and that the transaction forming the basis of this action was entered into as one of the means of furthering that scheme, they are instructed that the contract sued on is against public policy and void, and they must find for the defendant.

And the court, on its own motion, modified and changed all of them so as to make them read as follows:

98 (Instruction No. 3 as modified and given by the court.)

3rd. That the mere fact that Hugh Barclay, Jr., was defendant's cashier when Townsend claims to have sold his bonds, as detailed by him, is not of itself sufficient to make the bank liable in this action, and that unless they are satisfied by a preponderance of the evidence that Townsend sold his bonds to the bank, made the contract with the said cashier for the bank, they must find for the defendant. Given. R. R.

(Instruction No. 5 as modified and changed & given by the court.)

5th. That in weighing the evidence of a witness it is the duty of the jury to take into consideration the state of feeling, if any, exhibited by him or proven to exist towards the party for or against whom he shall have testified. Given. R. R.

(Instruction No. 6 as modified and given by the court.)

6th. That if the jury believe from the evidence that witness, Hugh Barclay, Jr., was of unsound mind at the time his deposition read on the trial was taken they have the right to give it such weight as they deem proper. Given. R. R.

(Instruction No. 7 as modified and given by the court.)

7th. That unless the jury shall believe from the evidence that the plaintiff Townsend demanded of the defendant the bonds mentioned and tendered to the bank the mount of money in pay-
99 ment therefor equal to the sum which he received for them in June, 1879, they must find for the defendant, unless the defendant by some affirmative act waived an actual tender of the amount to which at the time it was entitled under the agreement alleged by the plaintiff. An absolute refusal of plaintiff's demand would be a waiver of any tender in money. Given. R. R.

(Instruction No. 8 as modified and given by the court.)

8th. That even if the jury shall believe from the evidence that Barclay purchased Townsend's bonds for the bank and agreed that the bank would replace them, on demand, at the same price at which Townsend sold them, still, unless they shall further believe that said contract was previously authorized or subsequently ratified by the bank, they must find for the defendant. An acquiescence in the contract or failure to object to it after being informed of it (if the president was so informed) in a reasonable time thereafter must be regarded as a ratification by the bank if the contract was made by Barclay for the bank. Given. R. R.

(Instruction No. 10 as modified and given by the court.)

10th. That while a party in interest may lawfully testify in his own behalf, the fact that he has a pecuniary interest in the result of the trial is a matter to be considered by the jury in weighing his testimony. Given. R. R.

(Instruction No. 11 as modified and given by the court.)

11th. That if the jury believe from the evidence that the plaintiff and defendant or the plaintiff and Hugh Barlay, Jr., in June,
100 1879, or about that time, were engaged by agreement in a joint effort to manipulate the market price of Logan county bonds by controlling or attempting to control or influence the county court of Logan county or any member of that court, and that the transaction forming the basis of this action was entered into as one of the means of furthering that scheme, they are instructed that the contract sued on is against public policy and void, and they must find for the defendant. Given. R. R.

To all of which ruling and action of the court in changing and modifying said instructions Nos. 3, 5, 6, 7, 8, 10, 11 the defendant

excepted at the time and still excepts. The court also gave instructions Nos. 1, 2, 14, & 15 on motion of defendant.

(Instruction No. 1 for defendant given by the court.)

1st. That the burden of proof in this action is on the plaintiff, R. P. Townsend, and that he is required by law to make out his case by a preponderance of the evidence. Given. R. R.

(Instruction No. 2 for defendant and given by the court.)

2nd. That — is the duty of the jury in arriving at a verdict to take into consideration all the facts and circumstances proven on the trial. Given. R. R.

(Instruction No. 14 asked for by defendant and given by the court.)

14. Unless the jury shall believe that the plaintiff demanded of defendant the bonds or the amount of bonds and tendered to defendant the amount of money in payment therefor equal to
101 the sum which he received for his bonds in June, 1879, they will find for defendant, unless defendant by its action at the date of the demand waived an actual tender of the amount to which at the time it was entitled to receive for the bonds had they been delivered as demanded. Given. R. R.

(Instruction No. 15 asked for by defendant and given by the court.)

15. The court instructs the jury that they are the exclusive judges of the credibility of witnesses, and that in determining the degree of credit to which any witness is entitled they may take into consideration the interest of said witness in this case, his mental condition as proven, and his feelings towards the parties to this action. Given. R. R.

And these were all the instructions given and refused.

And thereafter, to wit, on the 25th day of January, 1884, the jury returned into court the following special finding and general verdict, to wit:

Special Finding by the Jury.

1. "Did Townsend sell the bonds to the defendant bank or to Hugh Barclay, Jr.?"
Ans. To defendant bank.
2. "What was the contract made at date of sale?"
Ans. That defendant would replace the bonds to plaintiff at the price paid at that time or less.

And also a general verdict as follows:

"We, the jury, find for plaintiff.

"R. E. SMALL, *Foreman.*"

Whereupon the court, at the instance and on motion of plaintiff's counsel, entered the following judgment:

102 (*1st Judgment Entered by the Court.*)

Logan Circuit Court. January Term, 1884, 17th Day.

FRIDAY, *January* 25, 1884.

R. P. TOWNSEND, Plaintiff,
against
THE LOGAN COUNTY NATIONAL BANK, Defendant. } Ordinary.

Came the parties, by their attorneys, Robert Rodes, special judge, presiding. The jury assembled according to adjournment, and, after hearing the conclusion of the arguments of counsel, retired to consult upon their verdict, and returned under the direction of the court the following special verdict:

"Questions to be answered by the jury:
1st. Did Townsend sell the bonds to the defendant bank or to Hugh Barclay, Jr.?
Ans. To defendant bank.
2nd. What was the contract made at date of sale?
Ans. That defendant would replace the bonds to plaintiff at price paid at that time or less."

Said jury also returned the following general verdict:

"We, the jury, find for plaintiff.

"R. E. SMALL, *Foreman.*"

Thereupon plaintiff, by attorney, moved the court for judgment on the finding of the jury. It is therefore adjudged by the court that said motion be sustained, and that plaintiff recover of defendant, The Logan County National Bank, the sum of four thousand four hundred and sixteen dollars, the amount claimed in the petition, with interest thereon, at the rate of six per cent. per annum, from the 25th day of January, 1884, until paid, and his costs herein
103 expended, for which execution may issue after ten days.

ROBERT RODES,
Special Judge.

To which action of the court in entering up judgment on said special verdict and general verdict defendant at the time excepted and still excepts.

And thereafter, to wit, defendant, by its counsel, appeared in open court and on the 25th day of January, 1884, filed a motion and grounds for a new trial herein as follows:

(*Defendant's Motion and Grounds for a New Trial.*)

Logan Circuit Court.

R. P. TOWNSEND, Plaintiff,
vs.
LOGAN COUNTY NATIONAL BANK, Defendant. } Motion and Grounds for a New Trial.

The defendant, The Logan County National Bank, by its counsel, now comes and moves the court to set aside the verdict, decision, and judgment herein, and for the grounds of its said motion it hereby alleges and assigns the following as materially affecting its substantial rights:

1st. "It says that the court erred when, at the conclusion of the evidence offered by plaintiff, it refused to grant defendant's motion for a peremptory instruction to find for defendant, said motion resting upon the three separate grounds then stated by counsel: (1) that the contract sued on was void for want of mutuality and a sufficient consideration; (2) that the contract was proven to have been made with the cashier, and that being so made it was beyond the scope of his authority and not obligatory on the defendant; and (3) that the contract sued on was *ultra vires*, beyond the corporate power
104 of the bank to make, and for that reason was not binding on the bank;" which motion was overruled by the court, and which ruling was excepted to at the time by defendant and is still excepted to.

(2.) The special verdicts and the general verdict are not sustained by sufficient evidence.

(3.) That the special verdicts and the general verdict are contrary to law.

(4.) That the court erred to defendant's prejudice in refusing to give the 9th, 12th, and 13th instructions asked for by defendant; to which refusal of the court defendant at the time excepted and still excepts.

(5.) That the court erred in modifying the 6th, 7th, 8th, and 10th instructions asked for by defendant by erasing from the said sixth instruction the words over which ink lines are drawn and by adding thereto the words written immediately thereafter by the judge, and by modifying the said tenth instruction by erasing that part across which lines in ink are drawn and by adding thereto the words immediately following, written by the judge, and by modifying the said 11th instruction by inserting the words "by agreement" therein without defining to the jury the legal purport of agreement, and by modifying the said instruction by adding thereto the words written by the judge; to all which the defendant excepted at the time and still excepts.

(6.) That the court erred in giving the 1st, 2nd, and 3rd instructions asked by plaintiff; to which defendant excepted at the time and still excepts.

(7.) That the jury failed to assess any amount of damages,
105 simply returning a verdict "for plaintiff," when by law they

should have assessed the amount of recovery in their general verdict.

(8.) That the misconduct of plaintiff's attorney in his argument to the jury, as hereinafter set out, was to defendant's prejudice, in this: That said attorney, John S. Rhea, Esq., made the closing argument in the case and took advantage of the fact that no reply could be made to him to state and dwell upon many things not proven in the cause and not inferable from anything that was proven; that in denouncing W. F. Barclay, the defendant's cashier, who was a witness in the case for defendant, he said that Barclay was "a trained and educated lawyer—a man whose friends had anticipated for him a magnificent career at the bar—who was to revise Story's Equity Jurisprudence, Kent's Commentaries, and recast the decisions of the court of appeals; that he was an ex-judge, and that in dealing with and writing to Townsend he was acting as a shrewd lawyer and not as the cashier; that as soon as Townsend demanded of the bank his bonds—December 14th, 1880—he (Barclay) called his board of directors together and they instructed him to resist plaintiff's claim; that thereupon he began to lay his plans as a sharp lawyer; that he then sent for Rayburn and Townsend and entrapped them into writing down a statement of plaintiff's claim, &c.," or in substance that, when in fact there was no evidence whatever that Barclay was or ever had been a lawyer and when it was in proof that Rayburn's and Townsend's statements had been written long before the board of directors ever heard of the
106 claim sued on; that by said counsel's unnecessary and unprovoked denunciation of said cashier the minds of the jury were prejudiced against the bank, and that there was no evidence in the case to warrant his said denunciation; that said counsel's insinuations that said defendant's cashier had testified or admitted that he and his family had employed counsel to go to Louisville and prevent Hugh Barclay, Jr., a witness for plaintiff, from being released from the asylum for the insane was wholly unwarranted by the evidence, the said W. F. Barclay's response to that question at the time being that he was in Colorado when it occurred and knew nothing about it.

BROWDER & EDWARDS,
Counsel for Defendant, The Logan County National Bank.

Order Overruling Motion to Grant a New Trial.

And thereupon prayed the court to set aside the verdicts and judgment aforesaid and grant it a new trial; which motion, after argument by counsel, was overruled by the court; to which judgment and ruling in refusing to grant it a new trial defendant at the time excepted and still excepts, and at the time of overruling said motion for a new trial the court on its own motion set aside the judgment entered on the 25th day of January, 1884, and in lieu thereof entered up another judgment in the following words, to wit:

(*Order Overruling Defendant's Motion and Grounds for a New Trial and Correcting Judgment.*)

Logan Circuit Court. January Term, 1884, 20th Day.

TUESDAY, *January 29th*, 1884.

107 R. P. TOWNSEND, Plaintiff,
against
THE LOGAN COUNTY NATIONAL BANK, Defendant. } Ordinary.

(Hon. Robert Rodes, special judge, presiding.)

The grounds and motion for a new trial having been considered by the court, it is adjudged that said motion by defendant be overruled and a new trial refused; to which defendant excepts and prays an appeal to the court of appeals, which is granted; but, it appearing to the court that there is an error in the amount of the judgment as already entered, the court now adjudges that said judgment be set aside; and it is now adjudged that in lieu of that judgment the following is now entered as the judgment of this court, namely: It is adjudged that plaintiff recover of defendant the sum of four thousand and thirty-two dollars, with interest, at the rate of six per cent. per annum, from this day, together with his costs in this case expended and for which plaintiff may have execution. To this order the defendant excepts and asks leave to file bills of exception herein, which is granted, and likewise prays an appeal to the court of appeals, which is granted.

ROBERT RODES,
Special Judge.

To which action of the court in setting aside the former judgment and entering up a new judgment as aforesaid defendant excepted and still excepts, and as to all errors, decisions, orders, rulings, and judgments of the court, as appears of record and as set forth in the foregoing bill of exceptions, defendant at the
108 time of the making thereof excepted and still excepts, and now prays an appeal to the court of appeals, which is granted; and to that end it now comes and files this its bill of exceptions and moves the judge of this court to sign the same and to direct that it be made part of the record in this cause, which is accordingly done. The court certifies and approves the foregoing bill of exceptions, beginning with R. P. Townsend's testimony, on page —, wherein the margin is marked X Y, and orders that same be made a part of the record, which is done accordingly. All those exceptions which precede R. P. Townsend's testimony on page X Y are not certified or approved by the court, inasmuch as this court was not present or personally cognizant of the facts or incidents therein detailed.

Given under my hand this 1st Feb'y, 1884.

ROB'T RODES,
Special Judge.

(*Statement of Clerk in Regard to Filing of Def't's Assignment of Errors.*)

And on the 4th day of February, 1884, came the defendant, by its attorney, and filed in the office of the clerk of this court its assignment of errors herein, which is in the words and figures following:

(*Defendant's Assignment of Errors.*)

Logan Circuit Court.

R. P. TOWNSEND, Plaintiff, *vs.* THE LOGAN COUNTY NATIONAL BANK, Defendant.	Assignment of Errors by the Defendant and Appellant, The Logan County National Bank.

The defendant herein and appellant, The Logan County National Bank, now comes and, by its counsel, Browder & Edwards,
109 files in the office of the clerk of the Logan circuit court, the court by which the appeal was granted, the following as its assignment of errors in this cause—that is to say, the appellant aforesaid complains that the circuit court erred to its prejudice in the particulars following, to wit:

1. By refusing to sustain its general demurrer to the plaintiff's petition and by overruling the same.

2. By sustaining plaintiff's demurrer to the 5th paragraph of defendant's answer and by refusing to overrule the same.

3. By refusing to give instructions No. 9, No. 12, and No. 13, asked for by the defendant on the trial at the January term, 1884, of the said circuit court.

4. By refusing to give instructions No. 3, No. 5, No. 6, No. 7, No. 8, No. 10, No. 11, No. 14 in the words and form asked for by defendant and as written by its counsel, and by modifying and changing all of said instructions in the manner and to the extent shown by the bill of exceptions herein, for the details of which reference is here made to said bill of exceptions.

5. By giving the instructions asked for on the trial by the plaintiff, notwithstanding defendant's objections thereto at the time, said instructions being No. 1, No. 2, and No. 3, asked for by plaintiff and fully copied in the bill of exceptions in this cause, to which bill of exceptions, for the words and purport of said instructions, reference is here made.

6. By refusing to grant and sustain defendant's motion made at the close of plaintiff's evidence, on the trial, in January, 1884, for a peremptory instruction directing the jury to find for the defendant, as set out in said bill of exceptions.

7. By entering up the judgment for $4,416.00 in favor of
110 plaintiff and against defendant on the — day of January, 1884, on plaintiff's motion, upon the return into court that day of the jury's special and general verdicts, notwithstanding the fact that said special verdicts were not signed by the foreman or by any member of the jury.

8. By entering up said judgment for $4,416, notwithstanding the fact that the jury by its verdict (the general verdict) failed to assess the amount of recovery, simply returning a general verdict in the following words: "We, the jury, find for plaintiff.—R. E. Small, foreman." For full particulars of which reference is here made to said bill of exceptions.

9. By refusing to sustain defendant's motion for a new trial made on the — day of January, 1884, as fully set forth in said bill of exceptions.

10. By entering the "order and judgment" January 29th, 1884, whereby the judgment of the court in this case for $4,416.00, entered January —, 1884, was set aside and another judgment in lieu thereof for $4,032.00 was made and entered, on the court's own motion, the error (among others) here complained of being that an error in the assessment of the amount of recovery entitled defendant to a new trial; for particulars of which see said bill of exceptions.

THE LOGAN COUNTY NATIONAL BANK,
By BROWDER & EDWARDS.

Feb'y, 1884.

(*Statement of Clerk in Regard to Filing Defendant's Schedule.*)

And afterwards, on the same day, came defendant, by its attorneys, Browder & Edwards, and filed in the clerk's office of this court its schedule herein, which is in words and figures following:

111 (*Defendant's and Appellant's Schedule.*)

Logan Circuit Court.

R. P. TOWNSEND, Plaintiff,
vs.
THE LOGAN COUNTY NATIONAL BANK, Defendant. } Appellant's Schedule.

An appeal to the court of appeals having been granted to the defendant, The Logan County National Bank, from the judgment of this court rendered at the January term, 1884, of this court, the said defendant and appellant now comes and by its counsel, Browder & Edwards, files this its schedule in the office of the clerk of this court, and by it directs the clerk to make and furnish it a complete record and transcript of the whole case, to copy all the papers and records, except the summons and subpœnas, in chronological order, beginning with the memorandum of filing the petition and ending with the last order or mention of the case on the order books.

LOGAN COUNTY NATIONAL BANK,
By BROWDER & EDWARDS, *Attorneys.*

February, 1884.

(*Appellant's Notice of Filing Schedule and Assignment of Errors.*)

Logan Circuit Court.

R. P. TOWNSEND, Plaintiff and Appellee,
vs.
THE LOGAN COUNTY NATIONAL BANK, Defendant and Appellant. } Notice.

The plaintiff and appellee, R. P. Townsend, is hereby notified that the defendant and appellant, The Logan County National
112 Bank, has this day filed in the office of the clerk of this court its schedule and assignment of errors in this cause, as provided by law.

LOGAN COUNTY NATIONAL BANK,
By BROWDER & EDWARDS, *Att'ys.*

February, 1884.

(*Officer's Return on Notice.*)

Executed on Dr. R. P. Townsend, February 15, 1884, by delivering a copy of this notice.

R. M. WARDEN, *S. L. C.*,
By J. R. PERRY, *D. S.*

(*Statement of Clerk in Regard to Filing of Defendant's and Appellant's Supersedeas Bond.*)

And on the 8th day of February, 1884, came the defendant and appellant, The Logan County National Bank, and executed in the office of this court supersedeas bond herein, which is in the words and figures following:

(*Defendant's and Appellant's Supersedeas Bond.*)

Logan Circuit Court.

THE LOGAN COUNTY NATIONAL BANK, Appellant,
vs.
R. P. TOWNSEND, Appellee. } Upon an Appeal of the Logan Circuit Court Rendered January 29th, 1884.

Whereas said appellant is about to take an appeal from a judgment of the Logan circuit court rendered at its January term, 1884, against it, in favor of the appellee, for the sum of four thousand and thirty-two dollars, with interest from the 29th day of January,
113 1884, and costs, and the appellant desires to supersede the said judgment: Now we, The Logan County National Bank, principal, and Wilbur F. Barclay, C. H. Ryan, W. F. Browder, and John W. Caldwell, sureties, hereby covenant to and with the appellee, R. P. Townsend, that the appellant will pay to appellee all costs and

damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform the said judgment in case it shall be affirmed and any judgment or order which the court of appeals may render or order to be rendered by the inferior court, not exceeding in amount or value the judgment aforesaid.

Witness our hands this 8th day of February, 1884.

THE LOGAN COUNTY NATIONAL BANK,
By W. F. BROWDER, *Its President.*
WILBUR F. BROWDER, *Surety.*
W. F. BARCLAY, *Surety.*
C. H. RYAN.
JOHN W. CALDWELL, *Sec't'y.*

(*Clerk's Certificate.*)

STATE OF KENTUCKY, *Logan County and Circuit,* } *sct:*

I, Thos. B. Harrison, clerk of the circuit court in and for the county and State aforesaid, certify that the foregoing one hundred and twenty-seven pages contain as full and complete transcript of the record and proceedings in the case therein named of R. P. Townsend, plaintiff, against The Logan County National Bank, defendant, as is required to be copied by the schedule of defend-
114 ant filed herein, as the same appears of record and on file in my office.

Given under my hand this 7th day of August, 1884.

THOS. B. HARRISON,
Clerk Logan Circuit C't.

Upon the foregoing record the following statement is made:

Statement — Parties.

Kentucky Court of Appeals.

THE LOGAN COUNTY NATIONAL BANK, Appellant,
vs.
R. P. TOWNSEND, Appellee. } Statement.

The judgment appealed from was rendered by the Logan circuit court at the January term, 1884, of said court, and may be found on pages 24, 25, and 26 of this record.

No summons to issue.

LOGAN COUNTY NATIONAL BANK,
By BROWDER & EDWARDS, *Its Counsel.*

August 8, 1884.

At a term of said court of appeals held on the 24th day of January, 1885, the following order was made:

Order — Submission.

Ordered that this cause be submitted.

And afterwards, at a term of said court held on 10th day of February, 1887, the following order and judgment *was* entered therein:

Judg't C't Appeals.

The court being sufficiently advised, it seems to them that there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed,
115 and that the appellee recover of appellant ten per cent. damages upon the amount of the judgment superseded herein, which is ordered to be certified to said court.

It is further considered that the appellee recover of appellant his costs expended herein.

On said 10th day of February, 1887, the said court delivered the following opinion:

LOGAN COUNTY NATIONAL BANK, Appellant,
vs.
R. P. TOWNSEND, Appellee.
} Opinion.

Appellee states in his petition that in June, 1879, he sold and delivered to appellant bonds of the county of Logan of the face value of $12,800, for which it paid him at the rate of 68½ cents on the dollar, and as a further consideration agreed to replace the bonds upon demand, at the same price or less; that he has offered to repay the amount so paid to him therefor and demanded the return of the bonds, which appellant refused to deliver, and hence he sues for a breach of the contract and asks judgment in damages for the amount of the difference between the price of 68½ cents paid by him and the par value of the bonds, which he avers they were worth when the demand was made. Appellant denies it purchased the bonds or made the agreement to replace them as alleged in the petition.

It seems to be established that at the time mentioned appellee sold the bonds, at the price and upon the terms stated, to H. Barclay,
Jr., who was the cashier of appellant, the bank, and the
116 issues of fact are whether he did so on his individual account or for appellant. Upon these issues the jury returned the following special findings:

1. "Did Townsend sell the bonds to the defendent bank or to Hugh Barclay, Jr.?

Answer. To defendant bank.

2. What was the contract made at date of sale?

Answer. That defendant would replace the bonds to plaintiff at the price paid at the time or less."

They also returned the following general verdict:

"We, of the jury, find for the plaintiff," and thereupon the court

entered judgment for $4,032.00. As the testimony of both appellee and Hugh Barclay, Jr., tend to sustain the special as well as the general verdict, we cannot say they are palpably against the evidence, and are not therefore authorized to disturb them. It is contended that the court erred to the prejudice of the appellant in rendering judgment for $30 in excess of the amount proved. The amount for which the judgment was rendered is the precise sum of the difference between the amount paid to appellee at the rate of 68½ cents on the dollar and the par value of the bonds; and, although the evidence shows some of the bonds were paid for at the rate of 69 cents on the dollar, which would make about the difference of $30 mentioned, yet the court had to be controlled by the uncontroverted allegations in the petition in respect to the amount paid. Section 329 of the Civil Code provides: "If by a general verdict either party be entitled to recover money of the adverse party, the jury in their verdict must assess the amount of the
117 recovery." But this section was clearly not intended to apply when the amount of recovery is not made an issue of fact or left to the discretion of the jury.

In this case, after the issues of fact were settled by the jury, the amount of recovery did not depend upon the discretion of either the court or jury, but upon a simple arithmetical calculation, according to the basis fixed by the pleadings, for by subsec. 4, sec. 126, allegations concerning value or amount of damages accompanied by an allegation of an express promise, or by a statement of facts showing an implied promise to pay such value or damages, such as was contained in the petition in this case, need not be proved unless traversed. It is contended by counsel that there are three distinct grounds upon each of which the demurrer to the petition as well as the motion for a peremptory instruction to the jury ought to have been sustained. These we will now consider.

1. The contract is void for want of mutuality and for want of sufficient consideration. The contract as stated in the petition, and about the nature and terms of which it seems to us there is no room for controversy, was fully executed by appellee, but only in part by appellant, and it is for a breach of the executory part this action was brought; and as there was nothing more to be done by appellee to entitle him to the right to demand a full performance by appellant of what it agreed to do there can arise no question of a want of mutuality, for the consideration for what remained to be done, as well as what had been done by appellant, had already passed from him and been received by it. It is not a pertinent inquiry whether either the consideration of the contract was sufficient or, as
118 has turned out, it was a judicious one. It was made at the instance of appellant or of its cashier and, as we must presume, with the expectation of profit; and if the bonds had been kept instead of being sold by appellant no loss would have resulted from returning them upon the demand of appellee, while a greater than the legal rate of interest would in the meantime have been realized on the amount invested in them.

2. The next ground is that the contract is not within the scope

of the cashier's powers and consequently not binding on the bank. The special finding of the jury reduces the discussion of this question to very narrow limits—in fact, precludes appellant from denying the authority of the cashier to make the contract—for if appellee sold the bonds to appellant, the bank, it necessarily follows they were appropriated and used by it, and having thus devised or elected to avail itself of whatever benefit might flow from the contract it cannot now in good faith repudiate the contract or any part of it nor deny the authority of the cashier to make it.

3. The last ground is that the contract is *ultra vires* the corporate authority of the bank, in direct violation of its charter, and consequently is no such an obligation as will charge the bank or make it to any extent, either in law or conscience, liable in damages or otherwise for breach of the conditions.

It seems to us that if the proposition be conceded it would not avail appellant, for if it had no authority under its charter to purchase the bonds it cannot in justice and conscience refuse to
119 abide by the judgment in this case, which involves nothing more than the return of the bonds and receipt of what it paid for them. To do less cannot be justified without permitting it to profit by its own wrong in violating the law of Congress under which it exists.

Probably according to a fair construction of the "national bank act" the power is not expressly given to appellant to purchase and deal in bonds of the character in question; but neither is it expressly prohibited by the act to do so, and there is a proper and well recognized difference between "the case of an engagement made by a corporation to do an act expressly prohibited by its charter or some other law and a case of where legislative power to do the act has not been granted." (See Hitchcock *vs.* Galveston, 6 Otto, 341, and numerous authorities there cited.)

In that case the following from the State Board of Agriculture *vs.* The Citizens' Street Railway Co., 47 Ind., 497, was quoted with approval: "Although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract."

If the special findings of the jury in this case be taken as true there needs no argument to show that the rule thus laid down applies to the contract we are considering, and to adopt the
120 opposite of that rule would invite a disregard of the provisions of the "national bank act" as well as fraud and bad faith towards those dealing with a corporation existing under it.

It is not stated in argument or pleaded that appellee has waived his rights under the contract sued on, or that he delayed for an unreasonable length of time in demanding performance by appellant; and as the rulings of the lower court upon the pleadings, as well as regards the instructions to the jury, are consistent with the views expressed in this opinion, the judgment must be affirmed.

Afterwards, at the same term of said court, held on the 8th day of March, 1887, the following order was made:

Order Filing Petition for Rehearing.

Came appellant, by counsel, and filed a petition and moved the court to grant a rehearing herein, which is submitted.

The petition for rehearing filed by the foregoing order is as follows:

Petition for Rehearing.

The appellant, The Logan County National Bank, respectfully begs the court to set aside its judgment rendered in this cause on the 10th day of February, A. D. 1887, and grant it a rehearing for the following reasons:

1. In construing section 329 of the Civil Code as applicable to the pleadings in this case, it seems to us that the court has fallen into an error, the consequences of which, if the rule shall be observed by trial courts hereafter, will be disastrous in the extreme. The boundary line separating the functions of the jury from t hefunctions of the court is practically eliminated, and powers which by law
121 are expressly withheld from the court and expressly conferred upon the jury are by this doctrine wrested from the one and arbitrarily bestowed upon the other. The language of the code is unambiguous and specific. It is as follows: "If, by a general verdict, either party be entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of recovery." The court holds that "this section was clearly not intended to apply where the amount of recovery is not made an issue of fact or left to the discretion of the jury." The court further holds that "in this case, after the issues of fact were settled by the jury, the amount of recovery did not depend upon the discretion of either the court or the jury, but upon a simple arithmetical calculation, according to the basis fixed by the pleadings, for by sub-section 4 of section 126 allegations concerning value or amount accompanied by an express promise to pay or by a statement of facts showing an implied promise to pay such value or damage, such as was contained in the petition in this case, need not be proved unless traversed."

We think the court committed two errors in the ruling—one of fact and one of law, the latter resulting from the former. The petition prays for $4,416.00, for (1) the difference between $12,800.00 of bonds at 68½ cents and $12,800 at par, making $4,032.00, and (2) for six months' interest on $12,800.00 of bonds at the rate of six per cent. per annum, making $384.00, the two sums amounting to $4,416.00. The averment is that the appellee was damaged in said two sums. This is a distinct "allegation of damages." It will not be contended that the petition, expressly or by implication,
122 avers an express promise to pay this sum or any part of it. The averment is that it agreed to replace his bonds at 68½ cents, and that having failed to do so appellee was damaged in the

sum of the difference between the two prices named and some accrued interest. Assuming that the answer does not traverse this allegation of damage (which we do not concede), we maintain that even then no recovery could have been had without proof of the value or damage, and the jury and not the court was the exclusive judge, not only of the fact but of the extent or amount of damage. There is no statement in the petition showing an implied promise to pay appellee $4,416 or any other sum. An express promise to replace certain bonds at a stated price is alleged, and simply because the law imposes upon the bank a liability in damages for breach of its alleged contract it is, it seems to us, extending the rule of legal implication beyond the danger line to hold that because it may be liable for damages it is liable for any amount that may be stated in a pleading. Sec. 153 of the code of 1854 is substantially the same as sec. 126 of the present code. Its language (that part applying to this question) is: "Allegations of value or of amount of damage shall not be considered as true by failure to controvert them." The present code provides that allegations concerning value or amount of damages must be proved, though not traversed, unless they be accompanied by an express promise to pay or by a statement of facts showing an implied promise to pay the amount claimed. Logically the two sections are identical, the verbal modification of sec. 153 of the old code made by sec.
123 126 of the new being surplusage, pure and simple. This is apparent to the most casual reader. A suit on a promise, whether express or implied, is a totally different thing from a suit for damages. If A sues B for goods sold, alleging that these are worth $500, and that B promised to pay him $500 for them this is an allegation upon an express promise, and the allegation of value need not be proven; but if he sued B for $500 damages for converting to his use goods of that value, or for failing to deliver goods of that value, the allegation of value must be proved, though not denied in the answer. This was the rule under the old code; it is the rule under the present code. The two sections are identical in principle; so that it may be stated as true that sec. 126 of the code of 1876 did not in any particular change the law as embodied in sec. 153 of the code of 1854, and that the interpretation of the act of 1854 by this court is equally an interpretation of the act of 1876. The adjudications of this court, from 14 B. Monroe to 6 Bush, have uniformly been to the effect that by sec. 153 of the old code allegations of value or amount of damage must be proven, though not traversed. In Daniel *vs.* Judy, 14 B. M., 316, the petition alleged that the defendant had converted to his use stone coal, the property of the plaintiff, of the value of $100. The defendant made no defense, filed no answer, and judgment for $100 by default was rendered by the circuit court. This court reversed the judgment because the "value or amount of damages" was not proved. The petition in that case manifestly contained a "statement of facts showing an implied promise to pay" for the coal, because
124 the conversion of another's property to one's own use raises an implied assumpsit, which is as good in law as an express promise.

In Huston *et al. vs.* Peters *et al.*, 1 Met., 558, the petition alleged that the plaintiffs were the owners of certain merchandise which the defendants, who were common carriers, undertook to transport for hire from Louisville to Nashville by water; that the merchandise was worth $250.00, and for defendants' failure to deliver the goods as agreed they sued the carriers for $250.00 in damages. The "allegation of value or amount of damages," to wit, $250.00, was not traversed by the answer, and a jury returned a verdict of $227.00 for plaintiff. The circuit court sustained the verdict, and this court reversed that judgment on the ground that the value or damage was not proven, though not denied. The same doctrine was announced by this court in Marr's Adm'r *vs.* Prather, 3 Met., 196; Skillman *vs.* Muir's Adm'r, 4 Met., 282; Bean *vs.* Hayden, 5 Bush., 426; Wood *vs.* Morgan, 6 Bush., 507, and we know of no departure from this doctrine. Sec. 239 of the code, which provides that "if, by a general verdict, either party be entitled to recover money of the adverse party the jury in their verdict must assess the amount of recovery," has an intimate connection with sec. 126, as we understand the two, and there can be no doubt, as we respectfully believe, that the Legislature intended by these two provisions to establish the practice of requiring the jury to fix or assess the amount of recovery in every case where allegations of value or damage must be proved, though not traversed. The case at bar was a trial by
125 jury. All the issues of fact were submitted to them, and their failure to say by their general verdict how much the plaintiff was damaged, when the amount of damage was by operation of law specifically in issue before them, is certainly fatal to the validity of the verdict in this case. "We, the jury, find for the plaintiff" was the verdict. What was its meaning? What its effect? The plaintiff had asked them to find that he had been damaged by the bank to the amount of $4,416.00, and by the verdict they directed the court to render judgment for appellee for $4,416.00. The verdict could mean nothing else. The court below accepted this—the only possible interpretation that can be considered—as the true meaning of the jury, and thereupon proceeded to enter judgment in conformity therewith. Judgment for $4,416, interest and costs, was accordingly rendered. This was January 25, 1884. On the 29th of January, four days thereafter, the views herein expressed were stated by counsel in an argument for a new trial, and although it was there confessedly demonstrated that the judge did not and could not know what the jury meant, other than that the appellee had been damaged in the sum of $4,416, and that under his own petition and evidence he was not entitled to that sum, and that therefore the verdict was void for uncertainty and because of non-compliance with sec. 329 of the code, and was void because of its absurdity and inconsistency. The learned court below concluded that he was mistaken when he supposed the jury meant to award the plaintiff $4,416. He thereupon put another construction on the verdict. He decided that, although the plaintiff had sued for

$4,416, and although the jury literally executed the law as
126 delivered to them by him, still he was in error in deciphering their meaning four days before. Instead of intending to give plaintiff $4,416 he then decided that they really intended to give him only $4,032, a difference of $384. He therefore set aside the judgment of January 25th for $4,416, which the jury said they found for the plaintiff, and entered up the judgment of January 20th for $4,032, which the court said was what the jury really meant. Suppose the jury had returned this verdict: "We, the jury, find for plaintiff, and assess his damages at $10,000," will any judge in christendom maintain that, under the pleadings in this case, where on their face only $4,032 was recoverable, but where judgment for $4,416 was prayed, the court can discharge the jury and then proceed to evolve from his own consciousness what he supposes the jury really intended? Is this a mere clerical misprision? Has a trial court the inherent power to receive a verdict which fixes a definite sum as the result of their deliberations, within the range and scope of their powers, and then arbitrarily disregard their finding and solemnly decide that they did not mean what they said? Such judicial conduct is *ultra vires*. The error was in so instructing the jury that they were induced to find for the plaintiff in the sum of $4,416, the amount claimed in the petition. All instructions were excepted to. The motion for a new trial was based on this erroneous instruction among others, and in arguing the case below on the motion we pointed out specifically that while the pleadings only entitled the plaintiff to recover $4,032, and while the plaintiff's evidence only entitled him to recover $4,002, yet the court had told the jury,
127 in effect, that they had the right to award him $4,416; that this verdict was given under the erroneous rule laid down by the court for their guidance, and that for this reason the verdict should be vacated and a new trial granted. The fact that the verdict was only $384 in excess of the sum recoverable is immaterial. The principle of *De minimis lex non curat* is not applicable here. The principle is the same, whether the amount of the excess be $384 or $3,840. The court below, admitting by its action that it had misled the jury into giving unwarranted damages, bluntly refused to correct its own undenied errors, and boldly undertook to remedy the evil for which it alone was responsible by deciding that a verdict for $4,416 was a verdict for $4,032. Not only was this done, but it has been conclusively shown to this court by the argument heretofore submitted on the merits that this last judgment is incorrect. This court, in its opinion, concludes this. The appellee himself and all of the witnesses who speak to the fact unequivocally state that 68½ cents was paid for $6,800 of the bonds, and that 69 cents (or over) was paid for $6,000 of them, making $8,798 received by him, and leaving due him $4,002. The question for the jury was, How much damage had the appellee sustained? The measure of damage was the difference between the amount paid him by the bank when it made the alleged purchase and the face value of the bonds when he made the demand for their return. This will not be disputed. Yet what are the facts? A jury returned a verdict,

under erroneous instructions, for $4,416, an excess of $384 over the sum recoverable under the pleadings, which verdict the lower court vacated and substituted one of its own for $4,032, which was
128 $30 in excess of the sum recoverable under the evidence. Surely this court will not tolerate such practices as this record discloses; and we are thus prolix in presenting this question in order to let the court see fully what hardships will result and have resulted from them.

We respectfully submit that section 329 of the code is peculiarly applicable to this case. It was an action for damages. A judgment for money was prayed for. The plaintiff complained that he had sold the defendant $12,800 of bonds, with the coupons for six months' interest included, for $8,768, and that the defendant agreed to sell him back bonds of like character and amount at that price at any time thereafter; that he demanded the bonds in Dec., 1880, at which time they were worth their face value, or $12,800, and that by reason of defendant's refusal to sell them to him for $8,768 he had been damaged in the sum of—what? The difference between $12,800 and $8,768? No; but that he had been damaged in the sum of $4,416, the difference between the price he got in June, 1879, and their value in Dec., 1880,—$4,032—and also $384, the accrued interest on them when he sold them. He prayed for $384 more than his pleadings entitled him to recover, but the jury were told by the court in effect that they might award this excess, and they did it. Suppose they had said that his damages were $10,000, under an instruction permitting such a verdict, would this court uphold it merely because the circuit court, after four days' reflection, and upon argument showing the incongruity of the finding, undertook to revise and make anew the verdict by cutting off what
129 he supposed to be the excess? An instruction allowing a jury to find a verdict for more than the pleadings authorize is as pernicious and destructive of the rights of litigants as an instruction permitting them to award more than the prayer demands, and there is but one remedy recognized by our system of practice for such a wrong—a new trial in which the jury are properly instructed. We think that section 329 was enacted for some purpose; that when the Legislature provided that in all cases where either party is entitled to a money judgment the jury must assess the amount of recovery, that it intended this as the exclusive mode of determining and fixing the exact amount of damage or value for which the party should be liable in all cases where the allegation of value or damage though not traversed must be proved. That this case comes within the rule is perfectly clear. No express promise to pay, no statement showing an implied promise to pay, is set out in the petition as the cause of action. The case is plainly an action for damages for breach of an executory contract. It is not claimed that the defendant promised to replace his bonds or to pay him a sum certain in default of so doing. It is not claimed that the bank had purchased his bonds, which were worth $12,800, and had only paid him $8,768 on them, and owed him the balance of $4,032, which balance it had promised but had refused to pay. The charge is that

by reason of the bank's refusal to comply with the stipulations of an alleged contract he has been damaged in the sum of $4,416. The idea or element of promise in the case as pleaded does not anywhere appear, as we construe the language of sec. 126 of the
130 code and as this court has uniformly construed it.

By way of illustrating the above views, the court is invited to examine section 330 of the code, immediately following section 329, and enacted as a part of the same chapter. "In actions for the recovery of specific personal property the jury must assess the value and the damages for the taking or detention of it." If A sues B for recovery of a horse which B has stolen, and alleges that the horse is worth $200, and that he has been damaged by his detention $50, and prays judgment for $300 if the horse cannot be returned, and the answer, without traversing either the allegation of damage or the allegation of value, merely denies title in the plaintiff and pleads in avoidance his own ownership, upon a trial of the issue what question would be involved? There is no express promise to return the horse or pay $200 in lieu thereof alleged There is no express promise to pay $50 damages for the detention alleged. There is, however, such a statement of facts in the petition as shows the defendant to be liable on an implied assumpsit or a promise implied by operation of law to do what? To return the horse or pay $200? No. To return the horse and pay $50? No. To pay $300 if the horse cannot be returned? No. His implied promise is simply to return the horse or, if that cannot be done, to pay the plaintiff his value, to be ascertained by a jury from the evidence, and to pay such damages as are proven, notwithstanding the failure of the defendant to controvert the allegation of value and damage. This principle is traceable through the entire code, and
131 to hold otherwise, we submit with respectful deference, would be to subvert one of the fundamental doctrines of our system of practice, deprive parties litigant of the right of trial by jury in a large class of actions, and destroy the power and efficacy of an important and much-revered arm of the judiciary.

The court concedes in its opinion that the judgment is for $30 in excess of the damages sustained by the appellee, but declines to disturb it for the reason that the court below "had to be controlled by the uncontroverted allegation in the petition in respect to the amount paid." The allegation is that appellee received 68½ cents for his $12,800 of bonds. The proof is that he received 69 cents for $6,000 of them. Relying upon the rule which this court has always approved since 1854, that allegations of damage or value must be proven, though not denied, the defendant did not specifically and *eo nomine* traverse any of the plaintiff's allegations concerning value or amount; but, assuming that these were traversed by operation of law, it directed its energies to the preparation of such parts of its defense as the code provides shall be stated in terms. The court below correctly instructed the jury that the measure of damages was not the difference between 68½ cents and the par value of the bonds, as alleged, but the difference between the amount paid him as proven and their par value, which difference was $4,002. The

jury, however, gave the plaintiff the whole amount sued for, namely, $4,416, which was $414 in excess of the amount shown by the evidence to be due; and in attempting to do for the jury
132 what the law declares shall be done by them alone—that is, to "assess the amount of recovery"—the court committed an error as grievous in principle, if not so hurtful in effect, as the jury had previously committed. He not only misled the jury into returning an unwarranted verdict, but refused to be guided by his own instructions to them when he undertook to rectify their mistake.

2.

We very confidently appeal to the court to re-examine the condition of the pleadings and the state of the record in connection with the plea *ultra vires* relied on by the defense. This plea is interposed in several forms, and the court in its opinion seems to have considered only one view of the question.

The demurrer to the petition was the first attempt to present this defense. This demurrer was overruled and this court sustains the ruling of the circuit court. The 5th paragraph is as follows: "Defendant says that said Barclay had no authority, right, or power to make, for and on account of defendant, the contract set out by plaintiff in his petition, and that defendant had no right, power, or authority to make it; that, as stated, it was a mere gambling transaction—a mere dealing in and betting upon the future value of said bonds—and was not authorized by defendant's charter or by law." To this paragraph plaintiff's demurrer was sustained and this court affirms that ruling. This is the second form of the plea. At the conclusion of the plaintiff's testimony on the trial the defendant moved for a peremptory instruction on the ground that the contract as proven was *ultra vires*. This motion was over-
133 ruled by the lower court and that decision is affirmed. Let us assume that these three rulings are correct, and that up to this stage of the proceedings no error was committed. This concession leaves the fourth and last form of this defense to be considered. After all the evidence had been introduced (and we request the court to read it in connection with this application) the defendant asked the following instruction, which was refused: "That the defendant is a national banking association capable of exercising only such powers as are expressly or impliedly conferred upon it by its acts of incorporation, and that the power to buy and sell municipal bonds for purposes of speculation or to engage in the purchase or sale of such securities for the purpose of manipulating or controlling their market value is not conferred upon the defendant bank by the provisions of its charter; and if the jury believe from the evidence that the cashier, Barclay, paid Townsend the full market value for his bonds and bought them for the sole purpose of enabling him or the bank to manipulate or control the price of said bonds in the market for speculative purposes, they must find for defendant, provided they shall believe that the plaintiff at the time knew that the bonds were to be used for such

purposes." The refusal of the court to give this instruction, we submit with confidence, cannot be justified upon any other ground than that chartered institutions are endowed with power to do any and every thing which may suggest itself to the diseased imagination or the culpable cupidity of any one of its officials regardless of the limitations imposed upon it by the act creating it. The powers conferred upon the bank are all enumer-
134 ated in the 8th section of the "national currency act." That section was never passed upon by this court until this case was decided, but, as shown in the argument heretofore submitted and to which we again invite the court's attention, it has been judicially interpreted by the court of appeals of New York, the court of appeals of Maryland, the supreme court of Vermont, the supreme court of Ohio, the supreme court of Minnesota, and the supreme court of Pennsylvania. All these eminent and learned courts have held, with absolute unanimity, that national banks cannot traffic in municipal bonds or securities of like character, for the express reason that power to do so, not having been granted, is prohibited to them. The fourth paragraph of the answer sets out, as matter of defense, that Townsend and Barclay were at the time engaged in an effort to manipulate Logan county bonds, with a view to speculative profits on their own account, and in view of the fact that some of the evidence tended to show that the bank, in the person of Barclay, might have been so engaged, or at least that a jury might so conclude, the instruction above was insisted upon. We do not believe that the learned and experienced judge who delivered the opinion in this case intended to affirm the ruling of the lower court in refusing this instruction, but that the very natural mistake was made in supposing that by giving the defendant's instruction No. 11 the court had substantially ruled as prayed for in the refused instruction, and that consequently no prejudicial error had been committed. Instruction No. 11, which was given, simply holds that if Barclay and Townsend had entered into a cor-
135 rupt combination to influence the Logan county court by improper methods the contract sued on was against public policy and void. The refused instruction embodies an entirely different legal proposition, and by rejecting it the court below in effect decided and this court by its judgment affirms, the doctrine that a national bank, notwithstanding the prohibition which the United States Supreme Court (see brief, pages 16, 17), in 92 U.S., 122, decided "is implied from the failure to grant the power," may enter into an arrangement with any one charged with knowledge of the purpose by which municipal bonds are to be bought and sold and manipulated for stock-jobbing operations. The court applies to this case the doctrine laid down by the United States Supreme Court in Hitchcock *vs.* Galveston, 6 Otto, 341, and by the supreme court of Indiana in the State Board of Agriculture *vs.* Citizens' Street Railway Co., 47 Ind., 497. We respectfully, but with great confidence, submit that the case at bar differs widely from both of these cases, and that the facts of this case do not bring it within the rule announced in either of them, especially in connection with this re-

fused instruction. In this case Townsend owned $12,800 of Logan county bonds, of which the bank held on deposit for him in June, 1879, $6,800, and $6,000 were in his own possession. He received a message from Barclay to come up to Russellville, and on arrival Barclay told him this (we quote Townsend's own words): "He said he had taken the liberty of selling $6,800 in Logan county bonds that I had on deposit there, in Louisville, at 68½ cents on the dollar, and that if I wished it he would replace them at the
136 same or a lower price. I told him it was all right. He said he could get 69 cents for the $6,000 in bonds I had brought up with me that day, and that he would replace them at the same or a lower price if I wished it. I sold the bonds to the defendant."

On cross-examination he says this: "When I came up with my bonds and saw H. Barclay, Jr., he said the bonds were fluctuating in the market; that he thought the present price a good one, and believed they would go lower; that he felt so confident of this he was almost willing to guarantee it. This was about all that was said at the time he bought the bonds and is the substance of the contract made between us at the time I sold him my bonds. If Logan county bonds had gone to 25 cents on the dollar, I would have felt bound to take them back and pay 69 cents for them, if Barclay had asked it. I would have felt bound because this was part of our contract." Barclay paid him by placing to his credit, some time after the alleged sale, the proceeds of what the bonds brought in Louisville. Part of them were sold before the alleged trade was made, and part of them next day, and Townsend, after the bonds had declined in price from 69 cents to about 50 cents, concluded to speculate in tobacco at Hopkinsville and steer clear of bonds, although he distinctly swears that the bank could have called on him at any time and made him pay 69 cents for the bonds. This evidence, taken in connection with the other testimony, would have warranted the jury in deciding that Townsend and Bar-
137 clay (as cashier, we will say) or Townsend and the bank were dealing or trafficking in these securities, or that the bank was doing so with his concurrence and knowledge, for speculative purposes, or with a view to certain stock-jobbing operations then in process of execution. To enter into such a scheme is not in any sense a part of the "business of banking" as defined by defendant's charter and illustrated by the overwhelming weight of authorities. "A mere defect of power in a corporation to make a contract" is not here interposed as a defense. A prohibition of the exercise of any such power, a total want of any power, a disability as sweeping and far-reaching as the disability of coverture, infancy, or lunacy, is relied on to shield the stockholders of this victimized institution from the ruinous consequences of a transaction which, if made at all, should have been placed before the jury in its true light. This was not done. In the case of Hitchcock *vs.* Galveston, *supra*, the facts were these: The city council had express power by its charter to construct sidewalks; the charter prohibited the council from borrowing over $50,000 for general purposes; the council contracted

with Hitchcock and others to build sidewalks and agreed to pay them for the work in bonds which it had no power to issue. The sidewalks were constructed in part by the contractors, pursuant to the agreement, and they were in good faith proceeding to finish the work when they were forced by the city authorities to suspend and abandon it. The council passed an ordinance declaring the contracts void. Hitchcock sued for damages. The plea of *ultra vires* was relied on in avoidance, on the theory
that the city had no power to borrow the money with
138 which to pay for improvements under a contract which
the charter expressly authorized it to make. This was not a suit on the bonds. If it had been, the want of power to issue them would have been an effectual plea in bar. The city was liable on its contract. The money to pay might have been raised by taxation or by some other mode than by issuing bonds, and the court decided in that case that the power to make the contract was expressly granted by the charter of the city, and for this reason, and for no other reason, was it liable in damages. This language of the court is exceedingly significant: "The promise to give bonds to the plaintiff in payment of what they undertook to do was, therefore, at farthest, only *ultra vires;* and in such a case, though the specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation may be held liable on its contract." If the contract itself is not "a thing transgressive of its corporate powers," the corporation is assuredly bound, even though the mode agreed upon for its execution cannot, for want of corporate power, be specifically observed. This case turned altogether upon the question of the city's corporate power to make the contract. The power was expressly granted in terms; it followed, as a matter of course, that it was binding. In the case at bar the power to make the contract is neither expressly nor impliedly conferred upon the defendant. Every court of last resort in the United States where the interpretation of sec. 8 of the "national bank
act" has been involved have decided in unmistakable terms
139 that the power to carry on the "business of banking by (1)
discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, (2) by receiving deposits, (3) by buying and selling exchange coin and bullion, (4) by loaning money on personal security, and (5) by obtaining, issuing, and circulating notes" does not include the power to deal or traffic in municipal bonds and securities of like character; that such a power is not included by the grant "to exercise under this act all such incidental powers as shall be necessary to carry on the business of banking," and that the failure to grant such a power is tantamount to a prohibition of its exercise. In the Galveston case the city council had express authority by the laws of its charter to make the contract for street improvements. In this case the bank was by implication prohibited from making the absurd and preposterous contract sued on. The two cases are as widely divergent as the poles, it seems to us, and we earnestly urge upon the court a review of the facts in this case. It is a noteworthy fact, that even in a case so

meritorious as Hitchcock's case, three such eminent jurists as Mr. Justice Bradley, Mr. Justice Miller, and Mr. Justice Field dissent from the judgment of the court.

The doctrine of the case of State Board of Agriculture *vs.* Citizens' Street Railway, 47 Ind., 407, is even less applicable to the case at bar than the Hitchcock decision, for the reason that the contract sued on in the Indiana case was made by the stockholders (not the directors, not any officer or agent) of the corporation; that the
140 evidence in the case showed that as a consequence of the trade enormous profits had been made by the railway company, which the stockholders, who made the contract, received in dividends; that the court distinctly refused to decide that the contract, although made by the stockholders, was valid. ("No question is discussed or decided relating to the validity of the contract, except so far as it relates to the street railway company to bind itself thereby, under the circumstances"); the circumstances being that the stockholders of the railway company, with other interested parties, had induced the board of agriculture to locate the State fair grounds at the terminus of its line, in the suburbs of Indianapolis, at an outlay of $20,000; that the railway Co. had made $6,000 per annum for three years, making $18,000 net profits by reason of the board's execution of its part of the agreement at a cost of $20,000; but the leading fact in this case, which takes it entirely out of the range of resemblance to the case at bar, is this: The State board agreed to locate the fair grounds at the place indicated on condition that the railway company and other subscribers to the enterprise should defray all the expenses. This is manifest from the pleadings. The averment of the petition is that "said plaintiff has performed all the conditions in said contract to be performed by it up to this time, and, on the faith of said subscription *to* said railway company and others, expended $20,000 in fitting up the grounds." The case was decided on a demurrer to the petition, and of course all the allegations of the petition were, for the purposes of the demurrer, taken to be true. The company's charter nowhere,
141 expressly or impliedly, prohibited the making of such contract. The court, in passing upon the sufficiency of the petition, said: "The modern doctrine is to regard corporations as possessing the powers expressly conferred upon them by the law, and such implied powers as are necessary to enable them to exercise the powers expressly granted and no others." The operation of a street railway, it was urged by the counsel for the plaintiff, involved the exercise of all such incidental powers as were necessary for the conduct of its business, which business is nowhere defined by law, as is the case with the "business of banking." If the power to make the contract is expressly or impliedly given, or if, under the peculiar circumstances of the case, it attaches as one of the incidental powers necessary for the conduct of the business of operating a street railway, then the contract is obligatory. This is the extent of this decision. Let us suppose that the contract in this Indiana case had been made by the president of the company by a mere verbal arrangement; that the company, by its answer, had denied his right

to make it; denied that it had corporate power to make it, and alleged and had introduced proof on the trial tending to show that the whole transaction was a mere speculative scheme devised to manipulate the price of real estate or the value of some other commodity then in the market and subject to fluctuations by means of stock-jobbing operations, does this court believe that a refusal of the circuit court to instruct the jury upon that view of the case would have been sustained by the Indiana supreme court? Certainly this court does not mean to decide that a national bank has the power to enter the field of
142 wild speculation, or to buy and sell merchandise or engage in the business of running railways or steamships. Limitations of power must begin somewhere. If the cashier of a bank goes upon the street and buys a drove of mules by assuring the seller that the mules will rapidly decline in a few days; that they are now worth $100 per head but will go down to $60 in a short time, and that he will replace the entire lot at $100, or even at a lower price, whenever "in the course of human events" he will draw his check on the bank for them, is a banking corporation to be held in damages for its failure to replace the live stock on demand? The then market price is paid for the mules; the seller gets value received; the cashier immediately sells them at the exact price for which he has just bought them. Not a dollar of profit is made. The mule market about 18 months after the transaction suddenly takes an upward turn. Such animals as the cashier bought for $100 are now worth $200. The trader solemnly appears at the counter of the bank and draws his check for fifty sound and trustworthy mules. His check is respectfully but firmly protested and he sues the bank for damages. Can he recover? If he had been dealing with a child ten years old, could he recover? If he had been dealing with a married woman, known to him as such, could he recover? If he had been dealing with a lunatic, within the precincts of an insane asylum, could he recover? Clearly, not. Why? The disability of infancy, the disability of coverture, the disability of lunacy—all simple pleas of *ultra vires*—
would be a barrier to his pathway, over which no court under
143 the sun would lift him. It would not avail to say that the infant got his mules, or that the lunatic made 'way with them, and unless he be permitted to subject their property to the payment of a claim arising out of market fluctuations, which he himself helped to superinduce, great and irreparable injury will befall him. The answer to all this is that persons dealing with artificial persons or persons under disability, where the disability is apparent or is made known to them, must do so at their peril. In this cause Townsend's remedy is against Barclay. He should not complain that unless the bank responds he is without remedy, for such is not the case. We trust that the court will see, on reflection, how unjustly the verdict in this case was procured against the bank, and for the court's refusal to give instruction No. 9 we think a new trial should be ordered.

3.

In disposing of the defendant's plea that the cashier had no power to make the contract, the court evidently fell into the manifest error of treating the question as though we had raised it for the first time in this court. Our complaint is that the court below sustained a demurrer to the 5th paragraph of the answer, which pleaded the cashier's want of authority to make it; that the court below modified and altered the meaning of instruction No. 8 given for the defendant and refused to give instruction No. 12 asked for by defendant, both of which instructions, we then thought and still believe, fairly embodied the law touching the powers of the cashier in this case. Of course, the refusal of the lower court to instruct
144 the jury upon a material and private point in this cause left them wholly unrestrained by any rule except their own unbridled will. A bank cashier certainly does not have boundless power. He is not an autocrat. He is not beyond the reach of the law. He is not the bank. There are some limitations on his power. The defendant in this case is not the slave of his passion nor the creature of his will. There are some things in the catalogue of commerce which he cannot do and which the law of the land declares shall affect only himself if he undertakes to do them. He cannot sell the banking-house and convey title thereto. He cannot revoke, repeal, amend, or alter its charter. He cannot substitute his whims for the law. What are his legitimate powers of which the public is presumed by law to be cognizant? The court below refused to say and, of course, the jury, in the absence of any guide, returned the verdict, which this court tells us "precludes the appellant from denying the authority of the cashier to make the contract." This position seems to us wholly untenable. We say this with sincere respect for the character and learning of the distinguished judge who delivered the opinion. Is the question of a cashier's ordinary authority a question of law for the court? Is the scope of his power, as defined and limited by law, a matter for the jury to decide or for the court to define? We are not complaining now of what the jury did, but of what the court misled them into doing. Is a verdict which is returned under a misstatement of the law so sacred and hallowed a thing that it must preclude the unsuccesful
145 party from calling in question the methods by which the verdict was procured? If a man be found guilty of murder under an instruction which tells the jury that there can never be a plea of self-defense set up, will this court tell him, when he complains of the erroneous ruling below by which the jury tried him, "that the finding of the jury precludes him from denying" the charge, and that he must go out and be hanged? Special findings are right or wrong according to the correctness or incorrectness of the rules laid down by the court for the enlightenment of the jury which returns them. If the court furnishes bad law, the jury will naturally return bad verdicts. We call the court's attention particularly to paragraph No. 5 of the answer to the changes made by the court in defendant's instruction No. 8 and to defendant's refused instruction No. 12.

4.

"If the special findings of the jury in this case be taken as true," the court decides that the plea of *ultra vires* is unavailing; but if the court below refused to properly instruct the jury, the special findings are *brutum fulmen*. We do not wish to repeat the argument upon the *ultra vires* issue. We file as a part of this petition a copy of the brief heretofore submitted and request the court to read it anew. The case of Weckler *vs.* 1st National Bank of Hagerstown, 42 Maryland, 581, is in many respects like this one, the difference all being in favor of the validity of the defense of *ultra vires* relied on. In other words, this case is much stronger than that. We call
146 attention to the marked resemblance in the two cases. Weckler deposited to her own credit in bank $1,000. The teller gave her a certificate of deposit. The bank was engaged in selling Northern Pacific railroad bonds on commission, and induced her to buy from it two $500 bonds, for which she paid it the $1,000 then to her credit. The bonds turned out to be worthless. She sued the bank for damages. The defense of *ultra vires* was successfully pleaded by the bank in the lower court—a jury, under the court's directions, finding for the bank. On appeal the case was very ably and fully argued, and in an exceedingly able and lucid opinion the court of appeals of Maryland affirmed the judgment on the sole ground that the contract was transgressive of the corporate powers of the bank. That was an executed contract, but the charge was that she had been induced to part with her money by the false and fraudulent representations of the bank, and that in this way it got her money without consideration. The court refused to go into this question, and squarely held that to the whole case as pleaded and proven the defense of *ultra vires* was open to the bank. This same court decided the case of 1st Nat. Bank of Charlotte *vs.* Nat. Exch. Bank, which was affirmed by the U. S. Supreme Court (92 U. S., 122), in which it was held "that, although national banks are impliedly prohibited from dealing in stocks, yet they may take stocks in payment or compromise of a doubtful debt in order to avoid loss;" and, further, that "dealing in stock is not expressly prohibited, but such a prohibition is implied from failure to grant the power, * * * and all such transactions must be com-
147 promises in good faith and not mere cloaks or devices to cover unauthorized practices." This is the language of Chief Justice Waite, and clearly imparts the views of the Court upon this question.

For these and other reasons appearing in the record and brief heretofore filed we request a reopening of the case, that it may again be heard by oral argument, or in such manner as the court may deem best.

WILBUR F. BROWDER,
Of Counsel for Appellant.

BROWDER & EDWARDS, *Counsel.*

March 7, 1887.

And afterwards, at the same term of said court, on March 12th, came appellee, by counsel, and filed a reply to the petition for rehearing, which is in words and figures following:

With the highest respect for learned counsel I submit the petition filed March 8th is but a reargument of the case. It points out no error of the court as to the facts presented by the record and suggests no mistake by the court as to any established principle of law or rule of practice. It seeks to show only that the court has drawn unwarranted deductions or made unauthorized application of the law to the facts, concerning which there was and could be no substantial dispute after the verdict of the jury.

An agreement to deliver bonds, which are in the nature of commercial securities, upon demand or at a fixed time *time* carries
148 with it the implied undertaking (in default of the delivery expressly agreed to) to pay the market value of such bonds on the day and at the place where the agreement should have been performed. Therefore we have in this case the express agreement to deliver the bonds, and upon default in that respect the implied agreement to pay in money their market value as commercial securities. There is no denial to the express averment contained in the petition, that the market value of the bonds on the day and at the place of the default was one hundred cents to the dollar. It is a clear case of an allegation of value coupled with a promise to pay a sum ascertainable from the admitted facts by a calculation which any one versed in the fundamental rules of arithmetic could readily make.

That the court or jury or the plaintiff made a mistake in the calculation does not change the principle of the 126 section of the Civil Code or vary the rule by which it is to be applied. The fact that the court corrected the supposed mistake by calculation based on conceded facts shows that the case here is within the rule announced and prescribed by the said 126 section of the code. It will not profit to reargue the question of *ultra vires*. If the bank had no power to purchase the bonds, then it held them after the attempted purchase for Townsend, the appellee, with the right to reclaim the money paid him at the time of the invalid contract of purchase. The highest interest it could take or claim in the bonds was the right to retain them till its money was repaid. It continued so to hold
149 said bonds till they were demanded by Townsend. A failure or refusal to deliver upon demand was a conversion of the bonds as of that date. The conversion involved an assumpsit to pay the market value of the bonds in lieu of their delivery. So in any case we have the implied promise coupled with the averment of value.

If the bank had disposed of the bonds before the demand of Townsend, then, upon the theory of counsel that the contract of purchase was void, the disposition was wrongful and illegal and the bank was bound, when Townsend came to make his demand, either to go into the market and purchase the bonds necessary to relieve itself of its obligation as bailee or else to pay Townsend money sufficient

to enable him to replace the bonds. In support of this doctrine the court is referred to the case of German Nat. Bank *vs.* Meadowcroft, decided by supreme court of Illinois in 1880 and reported in Brown's Nat. Bank Cases, vol. 2, page 462, and also in 95 Illinois, page 124.

It is there held that a national bank which has wrongfully converted the property of another is estopped to deny its liability to account upon the ground that it received and held the property in carrying on the business of a warehouseman outside of the powers conferred by its charter.

To permit the bank to keep the bonds or their proceeds in the face of the agreement under which they received them and to deny the appellee a recovery for the breach of said agreement would be to permit the bank to work a legal wrong, which the supreme court says can never be done by a corporation under the plea of *ultra vires.*

Railway Co. *vs.* McCarthy, 96 U. S., 267. No court has
150 more distinctly and unequivocally pronounced in favor of the doctrine than the Supreme Court of the United States. This is important in this case, because that court has the ultimate power to settle finally the true interpretation of the national banking law.

Upon this subject the court is again referred to the authorities cited in the brief filed for appellee on the hearing of the appeal.

The court is asked to overrule the motion for a rehearing.

WM. LINDSAY,
For Townsend.

And afterwards, at the same term of said court, on the 16th day of June, the following order was made:

The court being sufficiently advised, it is considered that the petition for rehearing herein be overruled.

I, Thomas J. Henry, clerk of the court of appeals in and for the Commonwealth of Kentucky, do certify that the foregoing and annexed one hundred and fifty pages contain a true and complete transcript (including copies — the supersedeas bonds & citations & returns and writs of error) in the cause therein set forth of
151 Logan County National Bank, appellant, against R. P. Townsend, appellee, as is on file in my office.

Seal Kentucky Court of Appeals.

Witness my hand and seal — office, at the capitol, in the city of Frankfort, this 5th day of September, A. D. 1887.

THOMAS J. HENRY, *C. C. A.*

Fee for this record	$53 25
Fee & tax for seal	1 00
	$54 25

Att.: THOMAS J. HENRY, *C. C. A.*

Endorsed on cover: Kentucky court of appeals. No. 170. The Logan County National Bank, plaintiff in error, *vs.* R. P. Townsend. Filed October 10, 1887.

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Endorsed on cover: Kentucky court of appeals. No. 170. The Logan County National Bank, plaintiff in error, *vs.* R. P. Townsend. Filed October 10, 1887.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 170

LOGAN COUNTY NATIONAL BANK, - Plaintiff in Error,

VERSUS

R. P. TOWNSEND, - - - - - - Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR,

WILBUR F. BROWDER,

Counsel.

1887

TRANSCRIPT OF RECORD FILED OCTOBER TERM, ~~1890~~.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.

Supreme Court of the United States.

LOGAN COUNTY NATIONAL BANK, Plaintiff in Error, *vs* R. P. TOWNSEND, Defendant in Error. } Supplemental Brief for Pl'ff. in Error.

In order to conform the brief heretofore filed in this cause to the requirements of Rule No. 21 of the Court, I beg leave to submit the following supplemental brief, praying the Court to let it be attached to and read as part of the original brief:

(I.) In June 1879 the defendant in error, Townsend, alleges that he sold to the plaintiff in error, the Logan County National Bank, $12,000.00 of Logan county, Kentucky, railroad subsidy bonds, at the price of sixty-eight and a half cents on the dollar, with the contemporaneous verbal agreement with the cashier of the bank, that it (the bank) was to sell them, or bonds of like character, back to him, on his demand, at any time, at the same price, or at a lower price. At the date of this alleged transaction the highest market price of these bonds was sixty-eight and a half cents on the dollar, so that Townsend received the full market value of his securities.

In December 1881 these bonds had risen in value to par; were worth in the open market dollar for dollar, and thereupon, in the month of December 1881, Townsend demanded the return of his bonds, or the sale and delivery to him of other bonds of like description, at the price of sixty-eight and a half cents on the dollar. The cashier with whom the alleged contract of June 1879 was made was at the time of this demand not connected with the bank, and no officer of the bank knew anything of the alleged transaction. Townsend's demand was refused. He thereupon sued the bank in the Logan Circuit Court for the sum of $4.416.00, the alleged difference between the value of the $12,000.00 of bonds, in June 1879, when he claims to have sold them to the bank, and their value at the date of the commencement of his action. The case was tried at the January term, 1884, of the Logan Circuit Court, and resulted in a verdict and judgment for Townsend for the whole sum claimed, to-wit: $4,416 00. This judgment was afterwards set aside by the trial court, on its own motion, and against the protest of the bank, and another one entered, at the same term, for $4,032.00, the court insisting that there was an error in the assessment of the amount of the recovery which it had the right to correct. This judgment was affirmed on appeal by the bank, by the Court of Appeals of Ken

tucky, on the 10th of February, 1887. The case is before this Court on a writ of error sued out and prosecuted by the bank for the purpose of securing a reversal of the judgment. In its defense to the action the bank relied on

(*a.*) The general issue. A denial of the existence of the contract.

(*b.*) That the contract, if any was really made, was one between Townsend and Hugh Barclay, Jr., (the then cashier) as an individual, and was not a contract between Townsend and the bank.

(*c.*) That the contract was void for want of a sufficient consideration.

(*d.*) That the contract was void for want of mutuality.

(*e.*) That the alleged contract was not within the scope of the cashier's powers, and therefore not binding on the bank.

(*f.*) That the alleged contract was ultra vires the corporate authority of the bank; in direct violation of its charter (the 8th. section of the National Bank Act), and consequently is not such an obligation as will charge the bank, or make it to any extent liable, in law or conscience, in damages or otherwise, for breach of its conditions.

The questions arising upon the above first two propositions were pleaded in the answer of the bank. (See page 13 of the transcript.) The other four questions, designated "c," "d," "e," "f," were raised by the bank by a demurrer to the petition of the plaintiff. (See page 13 of the transcript.) The last four named questions were also raised by the bank in its answer to the petition. (See page 13 of the transcript.) These last four questions were also raised by the demurrer of the defendant to the answer. (See page 15 of transcript.)

It was also objected by the bank, in its said answer, that the alleged contract was a mere gambling scheme entered into by the cashier and Townsend for the purpose of manipulating and controlling the price of the bonds, and on that account against public policy and void. (See answer of the bank on page 13 of transcript.) These questions were also raised by the bank in the written instructions which it requested the trial court to give the jury, on the trial, to-wit: Instructions No. 9, No. 12 and No. 13, all of which instructions are found on pages 57 and 58 of the transcript, and are printed herein, and all of which the trial court refused to give to the jury. The foregoing recitals relate to the trial of the case in the Circuit Court of Logan county.

In the Court of Appeals of Kentucky all these questions were raised by the briefs of counsel and by the petition for re-hearing

filed by the bank in that Court. In addition to them the further question was made in the Appellate Court, whether the trial court could, on its own motion, and over the stated objections of the defendant, set aside a judgment entered in pursuance of a verdict of the jury for $4,416.00, and, in lieu thereof, substitute another judgment, for $4,032.60 on the ground that the jury had erred in the assessment of the amount of recovery. It was further urged in the Appellate Court that the trial court had erred in refusing to set aside the verdict and to grant defendant a new trial on the grounds assigned and set out in the bill of exceptions.

The errors assigned are:

(II.) First. The plaintiff in error assigns as error and complains that the Court of Appeals of Kentucky erred to the prejudice of the plaintiff in error in directing and adjudging that the judgment rendered by the Logan Circuit Court in the action of R. P. Townsend, the defendant in error, *vs* The Logan County National Bank, the plaintiff in error, should be affirmed, and directing said cause to be remanded to said Logan Circuit Court, with directions to enter judgment and award a writ of execution in favor of said R. P. Townsend, defendant in error, and against said Logan County National Bank, plaintiff in error, for the amount of the demand sued on, with damages and costs. The said erroneous and prejudicial judgment of the said Court of Appeals of Kentucky will be found on page No. 70 of the record, immediately preceding said Court of Appeals' opinion as delivered by Judge Lewis, which is copied in the record as a part thereof, and which said judgment and opinion were rendered and delivered by said Court of Appeals on the 10th day of February, A. D. 1887. The said judgment of said Court of Appeals is erroneous because it deprives the plaintiff in error of the benefit and protection given it by the terms and provisions of the act of the Congress of the United States entitled "The National Bank Act," approved June 3, 1864, which said act of Congress is the charter of said plaintiff in error. Said judgment of said Court of Appeals is erroneous because it holds and decides, to the great prejudice of the plaintiff in error, which is a banking corporation organized and existing under said act of Congress, that the alleged contract or agreement sued on in the said Logan Circuit Court by said defendant in error was within the scope of the power and authority of the cashier of said plaintiff in error; that said cashier was empowered by virtue of his office as cashier of said National Bank to bind the plaintiff in error by the making of said alleged contract or agreement with the defendant in error. The plaintiff in error insisted in the said Logan Circuit

Court and in the said Court of Appeals, and still insists and maintains that said alleged contract was not within the scope of the cashier's powers, and for that reason is not binding on said bank. The terms of said alleged contract are that said cashier agreed to buy and did buy from the defendant in error $12,800.00 of the bonds of Logan county, Kentucky, issued to aid the building and in payment of said county's subscription to the capital stock of a railroad through said county, at the price of sixty-eight and a half cents on the dollar, and agreed to replace said bonds or bonds of like character to defendant in error at any time in future, on his demand, at the samc price or at a lower price.

Second. It was error to the prejudice of the plaintiff in error in the judgment of said Court of Appeals of Kentucky to declare and adjudge that the general demurrer filed by the plaintiff in error in said Logan Circuit Court to the petition (declaration) of the defendant in error should have been and was properly overruled by said Logan Circuit Court, and it was error to the prejudice of the plaintiff in error in said judgment of said Court of Appeals to hold and decide that the judgment of the said Logan Circuit Court in overruling said demurrer to said petition must be affirmed. The plaintiff in error maintained in said Logan Circuit Court and maintained in said Court of Appeals and now insists and maintains that the cause of action as set out in said petition against the said National Bank, plaintiff in error, was and is founded upon an agreement forbidden by the terms and provisions of the charter of the plaintiff in error—the act of Congress aforesaid; that it was a mere gambling transaction and one of the practices unauthorized and prohibited by the said "National Bank Act," and in overruling said demurrer to said petition said Logan Circuit Court erred to the prejudice of the plaintiff in error, and in affirming and giving effect and force to said judgment said Court of Appeals erred to the prejudice of the plaintiff in error.

Third. It was error to the prejudice of the plaintiff in error in the judgment of ihe said Court of Appeals to affirm the judgment of the said Logan Circuit Court in overruling the plaintiff in error's motion for a peremptory instruction directing the jury to find and return a verdict, as in case of a nonsuit, for the plaintiff in error, which motion was made by the plaintiff in error, on the trial of the cause in the said Logan Circuit Court, at the conclusion of the evidence introduced by and on behalf of the defendant in error. Said motion ought to have been sustained by the said Logan Circuit Court for the reason that the evidenee

introduced by the plaintiff showed that the contract upon which he based his action was made solely with the cashier of the plaintiff in error, and that the said cashier had no power to make such a contract, and that said plaintiff in error, being a banking corporation, was forbidden by said "National Bank Act" to enter into or make any such contract. It was error to the prejudice of the plaintiff in error in the judgment of the Court of Appeals aforesaid to affirm the judgment of said Circuit Court in overruling said motion for a peremptory instruction, as stated.

Fourth. It was error to the prejudice of the plaintiff in error in the judgment of the Court of Appeals aforesaid to affirm said Logan Circuit Court's judgment in overruling plaintiff in error's said general demurrer to said petition and in overruling plaintiff in error's said motion for said peremptory instruction, as hereinbefore set out, because both said petition and the evidence introduced on behalf of said defendant in error on said trial in said Logan Circuit Court showed that the alleged contract sued on was without sufficient or any consideration, and was, futhermore, void and unenforciable for want of mutuality.

Fifth. It was error to the prejudice of the plaintiff in error in the judgment of the said Court of Appeals to affirm the judgment of the said Logan Circuit Court in refusing to charge or instruct the jury on the trial as prayed for at the time by the plaintiff in error in "instructions" No. 9 and No. 12, which are printed below. Said two instructions were asked for by the plaintiff in error on the trial before the jury in the Logan Circuit Court, but that Court refused to give any of said instructions and refused to charge or instruct the jury substantially as so requested, and the plaintiff in error assigns as an error prejudicial to it the judgment of the Court of Appeals affirming the said Logan Circuit Court's judgment in refusing to so instruct or charge the jury.

Sixth. It was error to give the instructions asked for by the defendant in error on the trial of the cause in the said Logan Circuit Court, to the giving of all of which plaintiff in error at the time objected. It was error to the prejudice of the plaintiff in error in the judgment of the said Court of Appeals to affirm the judgment of the Logan Circuit Court giving said instructions over the objections of the plaintiff in error. Said instructions do not contain the law of the case.

Seventh. It was error to the prejudice of the plaintiff in the judgment of said Court of Appeals to affirm the judgment of the said Logan Circuit Court in sustaining defendant in error's demurrer to the 5th paragraph of the plaintiff in error's answer,

which paragraph sets out the alleged contract and avers (1) that the cashier had no power to make it, and (2) that the bank had no power make it.

Eighth. It was error to the prejudice of the plaintiff in error in the judgment of said Court of Appeals to declare, affirm and adjudge that the plaintiff in error, a National Banking Corporation, organized under the "National Bank Act," has the power under the said charter to traffic and deal in county subsidy bonds, and to decide that the plaintiff in error is bound to answer in damages amounting to the difference between the value of $12,800.00 of county railway bonds at sixty-eight and a half cents on the dollar, and their value at par, to-wit: $4,030.00 (the Court's computation), because a cashier of the plaintiff in error and the defendant in error claim to have made the extraordinary contract mentioned, by which the cashier took the defendant in error's bond and paid him sixty-eight and a half cents for them, their full market value at the time, and agreed to let him have similar bonds at any time thereafter, on his own demand, at the same price or at a lower price.

Ninth. It was error to the prejudice of the plaintiff in error in the judgment of the Court of Appeals of Kentucky to hold and adjudge the Logan Circuit Court had the right and power under the law to assess the amount of recovery when the jury failed to do so It was error to the prejudice of the plaintiff in error in the judgment of the Court of Appeals to hold and decide the judgment of the Logan Circuit Court overruling plaintiff in error's motion for a new trial was correct and should be affirmed, and that the verdict of the jury was sustained by the evidence.

Tenth. The Logan County National Bank, plaintiff in error herein, now comes and says that since the filing of its original assignment of errors in this cause, on the 16th day of June, 1887, it filed in the office of the Clerk of the Court of Appeals of Kentucky a petition for rehearing, as provided by the laws of Kentucky, wherein it stated the grounds upon which it moved the said Appellate Court to set aside the judgment rendered herein on the 10th day of February, 1887, and to grant it a new trial or rehearing of said cause, and that said petition for rehearing came on for trial and consideration in and before said Court of Appeals on the 16th day of June, 1887, and that said court, by its decision and judgment, that day rendered and entered of record, overruled said petition and refused to grant the plaintiff in error a new trial of the cause.

Plaintiff in error assigns as error the decision and judgment of the Court of Appeals aforesaid overruling said petition for re-

hearing, and complains that by said decision and judgment, which was erroneous and in violation of its rights as secured to it under the act of Congress specifically relied on and cited in its original assignment of errors, the plaintiff in error was and is greatly damaged, and it prays for a reversal of said judgment and as formerly, &c.

The Circuit Court erred, and the Court of Appeals, in affirming its judgment, erred, in refusing to give the following instruction to the jury upon the trial of the case, which instruction the bank moved the trial court to give on said trial:

"That the defendant is a National Banking Association, capable of exercising only such powers as are expressly or impliedly conferred upon it by its act of incorporation, and that the power to buy and sell municipal bonds for purposes of speculation, or to engage in the purchase and sale of such securities for the purpose of manipulating or controlling their market value, is not conferred upon the defendant bank by the provisions of its charter, and if the jury shall believe from the evidence that the cashier, Barclay, paid Townsend the full market value for his bonds and bought them for the sole purpose of ennabling him or the bank to manipulate or control the price of said bonds in the market, for speculative purposes, they must find for the defendant; provided, they shall further believe that the plaintiff at the time knew that the bonds were to be used for such purposes."

In refusing to give the above instruction to the jury the trial court erred to the prejudice of the defendant; and in affirming the judgment of the trial court in refusing to so instruct the jury, the Court of Appeals erred to its prejudice.

No other instruction was given by the trial court covering this view of the case, notwithstanding the pleadings and the evidence made a direct issue upon that point.

(III.) The defendant on the trial in the Circuit Court moved the court to give to the jury the following instruction: "That the powers and duties of the cashier of the defendant bank are limited and defined by law, and that all persons who deal with him are presumed to know the law, and in this case the jury are instructed that the contract sued on is not such a contract as falls within the scope of the authority of defendant's cashier in the exercise of the ordinary functions of his office, and that unless said contract was made, if made at all by him as cashier, with the knowledge and consent of the board of directors of defendant, or was afterwards, when brought to their knowledge, ratified by said directors in some form, they must find for defendant." This was refused by the court, and the ruling of the trial court in refusing this instruction, and of the Court of Appeals in affirming that ruling, are assigned as error here.

WILBUR F. BROWDER, *Counsel.*

SUPREME COURT OF THE UNITED STATES.

LOGAN COUNTY NATIONAL BANK, - *Plaintiff in Error,*

VERSUS

R. P. TOWNSEND, - - - *Defendant in Error.*

Brief for Plaintiff in Error.

The object of this writ of error is to secure the reversal of a judgment recovered by the defendant in error, R. P. Townsend, against the plaintiff in error, The Logan County National Bank, at the January term, 1884, of the Logan Circuit Court, of Kentucky, which judgment was affirmed on appeal by the Kentucky Court of Appeals, February 10, 1887. The construction of a Federal statute — "The National Bank Act" — being necessarily involved in the litigation, leaves no room to question the jurisdiction of this court of this proceeding. The cause of action is founded upon an alleged contract made by Townsend and Hugh Barclay, jr., the bank's cashier, in June, 1879, by the terms of which the defendant in error sold to the plaintiff in error $12,800 of Logan County railway subsidy bonds, at the price of 68½ cents on the dollar, with the contemporaneous agreement that the bank was to sell back to him on demand these bonds, or bonds of like character, at the same or at a lower price. When this transaction took place the highest market value of these securities was 68½ cents on the dollar. Owing to certain rumors afloat throughout the county foreshadowing the policy of the County Court (the fiscal court of Logan County) respecting its purpose to impeach the validity of these bonds by judicial and other proceedings—a policy which was definitely avowed and put in motion by the formal action of the County Court within

a few days after the date of this alleged agreement—these securities were at the time of uncertain value, and were excellent material for the purposes of speculation and stock-jobbing operations. Townsend delivered his bonds and received his money for them. The whole amount of the purchase price, about $8,000, was paid to him, and was placed to his credit on the books of the bank, where he regularly kept an account up to that time, and within a month or two thereafter he withdrew the entire sum from the bank to embark in a venture in tobacco at Hopkinsville, Kentucky. The *fact* that Barclay had purchased these bonds was known to the president of the bank, but to none of the directors; nor did the president know, or have any reasonable grounds to suspect or believe that the cashier had purchased them for the bank. In August, 1879, Barclay's active connection with the management of the bank was terminated by his resignation of the office of cashier; and although he thereafter continued to hold some official position in name, being a portion of the time president, his infirm health and intemperate habits disqualified him for efficient service. In February, 1880, he was stricken with paralysis, a most violent attack, the effect of which was to destroy his powers of speech and locomotion; and at the January term, 1881, of the Logan Circuit Court he was adjudged insane, the jury deciding that his mental derangement was the gradual development of the two preceding years. In the mean time the value of the Logan County bonds had been steadily advancing, and in December, 1881, they were worth dollar for dollar on the market.

The bank officials up to this time were in total ignorance of the contract made eighteen months before, except to the extent stated above, for the reason that there was no memorandum in writing made by the contracting parties to perpetuate the evidence of this extraordinary bargain. The whole arrangement was verbal. Not a letter or line thereof was reduced to writing. In December, 1881, a few weeks prior to Barclay's adjudication of insanity, and while he was living apart from and in open hostility to his wife and children and former associates and friends,

in one of the hotels of Russellville, Townsend procured from him a written statement to the effect that in June, 1879, he had purchased on behalf of the bank the bonds in question at about sixty-nine cents, and had bound the bank to replace them at the same or at a lower price on demand. Having armed himself with this weapon, he proceeded at once to demand the bank's surrender, and, upon its refusal to capitulate upon the terms proposed by him, he instituted an action for the recovery of damages in the sum of $4,416, the alleged difference between the value of $12,800 of bonds at sixty-eight and one half (68½) cents on the dollar and one hundred (100) cents on the dollar and interest. To the petition the bank filed a general demurrer, which the court overruled, and on the trial, after Townsend had concluded all the evidence offered in support of his claim, counsel for the bank moved the court to instruct the jury peremptorily to find for the defendant; which motion the court overruled. Inasmuch as the same questions arise upon the demurrer and the motion for a peremptory instruction, it is proposed to discuss these two branches of the case together. It will be observed that Townsend claims a two-fold consideration. He alleges that the money paid him for his bonds was only a part of the consideration which induced him to part with his property, and that the bank's agreement to replace them on demand at the same or at a lower price was as much the inducement for him to do so as the money he received. There are three separate and distinct grounds upon which the demurrer and motion for a peremptory instruction were founded, any one of which, it seems to us, is sufficient to authorize this court to reverse the judgment of the court below in overruling them both:

1. *The contract is void for want of mutuality, and for want of a sufficient consideration.*

2. *The contract is not within the scope of the cashier's powers, and for that reason it is not binding on the bank.*

3. *The contract is ultra vires the corporate authority of the bank; in direct violation of its charter, and consequently is not such an obligation as will charge the bank or make it to any extent, either in*

law or in conscience, liable in damages or otherwise for breach of its conditions.

First. The contract is a mere *nudum pactum*, as even the most superficial inspection of it terms will demonstrate. What is a contract? "An agreement, upon sufficient consideration, to do or not to do a particular thing." This definition, handed down to us by Blackstone, has never been improved upon by any text-writer, or legislative enactment or judicial utterance, and is the acknowledged doctrine of all the courts of the country. By this definition this contract must stand or fall. A contract being "an agreement, upon sufficient consideration, to do or not to do a particular thing," there arise three considerations in treating every contract: 1, the parties; 2, the consideration; and 3, the thing to be done or omitted. In this case the parties, so far as this view of the case is concerned, may be said to be competent to contract. The thing to be done is clearly understood, namely, the payment to Townsend of $8,000 in money for $12,800 in bonds, which was done at the time; and the further thing to be done by the bank was to hold itself in readiness, for an indefinite period of time, to replace these or similar bonds at the same or at a lower price on demand. The money consideration was undoubtedly good and sufficient; but inasmuch as the money was paid, and no action to recover it is pending, the bank's alleged undertaking to return the bonds at the same price is the sole remaining element of the transaction by reason of which it can be said to be liable. The contract, as will be seen, is partly executed and partly executory; and this action is based upon an alleged breach of the executory contract. Is this executory agreement, considered in connection with the executed contract, from which it can not be separated, a valid and obligatory undertaking? Is it not, unless supported by a sufficient consideration, and what consideration underlies it? The market value of the bonds was 68½ cents, and this market value, all that they were worth, was paid to appellee when he sold his bonds. He got all that his property was worth when he parted with it. These bonds were not endowed with any special value in addition to what they

would bring in the open market. What benefit could the bank derive, or what inconvenience could Townsend undergo, by the plaintiff in error's payment of the highest market price for the bonds for the purpose of holding them indefinitely, at its risk, for the sole benefit of the defendant in error? If the bank had obtained these securities at a reduced price, then that fact might be urged as a consideration for the conditions imposed upon the bank; but in the absence of this fact the executory agreement is wholly without consideration. It is claimed that the bank's object in buying Townsend's bonds was to obtain control of the bonded debt of Logan County, amounting to about half a million of dollars. Leaving out of question the transparent absurdity of this pretense, this effort to manipulate five hundred thousand dollars of bonds by paying 68½ cents on the dollar for $12,800 of the series, and agreeing to hold them in trust for the seller as long as he might desire, and to return them to him on demand at 68½ cents, regardless of their appreciation in value in the mean time—a system of financiering that would have bankrupted the Count of Monte Christo, and undermined the solid foundations of the Bank of England—omitting this view, is not the contract totally barren of all mutuality? How was the bank to be benefited? How was Townsend to be incommoded? One of these two things must exist in order to create a sufficient consideration. The price of the bonds in money was paid at the time—the price in damages is demanded now. The claim on its face is preposterous. The defendant in error pretends that he sold the bank his bonds for $8,000, all that they were worth, and also for the extraordinary privilege of calling at any subsequent time and buying them back at the same price or even at a lower price. In the exuberance of his magnanimity he has not availed himself of his option to get them below 68½ cents, although by the terms of his trade it was his manifest right to have them placed to him at any figure under the rate at which he sold them. It is impossible to show any benefit accruing to the bank or any disadvantage resulting to Townsend from so absurd a contract. If Barclay had executed his promissory note to Townsend for

$1,000, without receiving in return some equivalent, the note in the payee's hands would not be binding on the obligor, because of no consideration. If Barclay had promised to pay him one thousand dollars on demand for the mere privilege of making a naked promise, no action could be maintained upon the promise, because it would be a mere *nudum pactum*. The consideration is the soul, the life, the essence of every contract, without which it is a dead letter, unworthy the serious thought of any court. In this case Townsend held all the odds, the bank none. If the bonds went up, he was to get all the profits; if they went down, the bank was to bear all the losses. He was hedged about by every conceivable safe-guard and guaranty, while in any event the bank was at his mercy. He parted with *all* he had to sell when he delivered his bonds and received the $8,000, and there was nothing left for him to give the bank in return for the remarkable claim he now asserts against it. These views are respectfully presented to the court as embodying the settled doctrine of the law upon the subject of considerations of contracts as applicable to this case.

Second. "The contract is not within the scope of the cashier's powers, and for that reason is not binding on the bank." This proposition is confessedly debatable ground. The difficulties always encountered in attempting to define and point out the boundary line separating the functions of the office of the cashier from the functions of the office of director are frankly conceded in the outset of this argument. But there are certain fundamental principles so well established, so uniformly avowed and adhered to by all the courts, both English and American, that we have but to apply them to the facts of this case to find that this cause of action is wholly destitute of all the elements that go to make up a just and lawful demand. The contract was made by Barclay, the cashier. Did he have the legal power to make it? Was it in the line of his duty as prescribed by law; was it within the range of his authority? It seems to us that it was not, in view of the inherent nature of the office, and the powers and duties incidental thereto. The solution

of the problem lies in the fact that the office of cashier is *strictly executive*—the office of director is strictly *deliberative*. The cashier does not perform one legislative or judicial function. He executes the will of the directory. They devise; he carries into effect. They deliberate; he acts. They legislate; he executes. They are the architects; he is the builder. "His powers and duties may be summarized as follows:

"He is the chief executive officer of the bank. All its financial operations, though not determined by his discretion, are yet conducted by and through him. He has charge of all its property, its money, its securities, its valuable papers, its correspondence, its records. He has the superintendence of its books of account." "It is his province to keep the funds, notes, bills, and other choses in action of the bank, to be used from time to time for the exigencies of the bank; to receive, directly or through subordinate officers, all moneys and notes of the bank; to surrender notes and securities upon payment; to draw checks; to withdraw funds of the bank on deposit; and generally to transact, as the executive officer of the bank, the ordinary routine of business. But the ordinary duties of a cashier do not comprehend the making of a contract which involves the payment of money, without an express authority from the directors, unless it be such as relates to the usual and customary transactions of the bank."

(Morse v. Mass. Nat. Bank, 1 Holmes, 209; The United States v. The City Bank of Columbus, 21 Howard, 356; Fleckner v. Bank of the U. S., 8 Wheaton, 360; Bank of U. S. v. Dunn, 6 Peters, 51; Baldwin v. Bank of Newberry, 1 Wallace, 234; Merchants' Bank v. State Bank, 10 Wallace, 604; Morse on Banks and Banking, 151.) In the case of the Bank of the U. S. v. Dunn, 6 Peters, 51, cited above, this court decided that a release given by the president *and* cashier to the endorser of a promissory note, of his liability upon it, did not bind the bank, for the reason that neither of these officers had any authority to make such an agreement. In the case of U. S. v. City Bank of Columbus, 21 Howard, 356, the same court, in citing with approval Bank of U. S. v. Dunn, uses this language:

"The court would not permit the president and cashier of the bank to bind it by their agreement with the endorser of a promissory note, that he should not be made liable on his endorsement. It said it is not the duty of the cashier and president to make such contracts, nor have they the power to bind the bank except in the discharge of their ordinary duties. All discounts are made under the authority of the directors, and it is for them to fix any conditions which they may think proper in loaning money. The court defines the cashier of the bank to be an executive officer, by whom its debts are received and paid, and its securities taken and transferred, and that his acts, to be binding upon the bank, must be done within the ordinary course of his duties. His ordinary duties are to keep all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives, directly, or through the subordinate officers of the bank, all moneys and notes of the bank, delivers up all discounted notes and other securities when they have been paid, draws checks to withdraw the funds of the bank when they have been deposited, and, as the executive officer of the bank, to transact most of its business."

These cases are decisive of the question. Tested by the principles enunciated by the highest judicial authority in this country, the transaction under review in this case must necessarily be condemned as unlawful. The purchase of bonds unconditionally would have been an unauthorized act on the part of the cashier, because it involved the payment of money, and required the sanction of the Board of Directors. If an unconditional purchase of these bonds would have been illegal for want of authority on the part of the cashier to enter into such a bargain, it is needless to argue that he had no power to bind the bank by the unheard-of-agreement to hold these securities indefinitely for the sole purpose of enabling Townsend to regain possession of them at the same price whenever it suited his convenience to do so. Barclay's contract can not bind the appellant. He was clearly wanting in legal power to make it. He had no more authority to negotiate this transaction on behalf of the bank than he would have had to buy for it, on speculation, a drove of mules for shipment and sale in the Southern market, or a cargo of cotton for export and sale in Liverpool or London.

Third. "The contract is *ultra vires* the corporate authority of the bank itself; is in violation of its charter, and is consequently not such an obligation as will charge the bank, or render it to any extent liable, in law or conscience, for breach of its conditions."

The plaintiff in error is a National Bank, organized and existing under the provisions of the act of Congress entitled, "The National Bank Act," approved June 3, 1864. This act is its charter. All of its powers, duties and responsibilities are derivable from this statute and the amendments thereto subsequently enacted. The nature of corporations is so admirably defined by the learned judge delivering the opinion of the court in Curtis v. Leavitt, 15 N. Y. 256, that we quote at some length from that decision:

"Corporations are purely artificial beings. They have no existence independent of the act which creates them, and can therefore have no powers except such as that act confers. An enabling statute, enacted in reference to a natural person, simply superadds a power to those already possessed. It acts in combination with the natural rights of the individual; and courts, in determining the extent of the power, must necessarily take into consideration all the rights and powers which belong to the individual independently of the statute. The authority conferred is the complex result of the legislative act taken in connection with the pre-existing rights. Substantially, the same is true in case of a supplementary act granting additional powers to an existing corporation. But in construing the original organic act, the inquiry is much narrower and more simple. The charter of a corporation is the sole source of its existence, and it can, legitimately, no more exercise powers not deducible from such charter than a man can exercise powers denied him by nature. Although this is apparently self-evident, I will refer to one or two authorities, simply to show the clearness and force with which the doctrine has been judicially expressed. In Head v. The Providence Ins. Co., 2 Cranch, 127–169, Chief Justice Marshall, speaking of the exercise of corporate powers, says, 'An individual has an original capacity to contract and bind himself in such manner as he pleases. But with those bodies which have only a legal existence it is otherwise. The act of incorporation is to them an enabling act; it gives them all the power they possess.' In Darmouth College v. Woodward, 4 Wheaton, 518, the same em-

inent judge says, 'A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly on as incidental to its very existence.' Chief Justice Hosmer, of Connecticut, asserts the same doctrine in the cases of New York Fire Ins. Co. v. Ely, 5 Conn. 560, and in Berlin v. New Britain, 9 Conn. 175. In the latter case he says: 'The powers of a corporation, an artificial person, are such, and such only, as its charter confers. It may act in the manner and for the purposes prescribed, but beyond this line it can not go.' Similar language was held by Chief Justice Thompson in the case of The People v. The Utica Ins. Co., 15 John. 383. Speaking of the powers of the corporation, he says, 'Such an incorporated company has no rights except such as are specially granted, and those that are necessary to carry into effect the powers so granted.'"

These views are so universally recognized by the courts as embodying the law that it is needless to enforce them by argument or the citation of other authorities; and unless it can be shown that the appellant was clothed with legal power to enter into the contract forming the basis of this action, unless the "charter of its creation" conferred this power upon it in express terms, or by implication, or unless such power exists as one of the incidental powers necessary to carry into effect those expressly granted, the contract is *ultra vires*, and the cause should be reversed with directions to the Circuit Court to sustain the demurrer to the petition. In the following argument it is our purpose to demonstrate, if possible, that the bank had no power to make the contract in question, which we feel confident can be done by the overwhelming weight of authority and upon reason, unless, indeed, this court shall concur in the opinion of the learned special judge below, whose reply to the array of authorities produced on the trial was that the adjudications of the Supreme Courts of the States were entitled to very little respect.

The "National Bank Act" is a model of legislative workmanship. In symmetry of form and structure, in transparency of meaning, in clearness and conciseness of statement, in the use of adjudicated terms and words of well established import,

it has never been equaled by any similar performance of any of our legislatures, State or Federal, and if we except the "Indian Contract Act" of 1872, enacted by the British Parliament, the history of English legislation affords no better specimen of law literature, if indeed it contains any as good. The construction of this act will be decisive of this case, and inasmuch as the question has never been directly passed upon by this court it is hoped that the court will indulge us in the presentation of a somewhat elaborate argument.

All the powers possessed by the plaintiff in error for the purposes of this case are conferred by section 8 of the charter, which is as follows—the *italics* being ours:

. . . "That every association formed pursuant to the provisions of this act shall, from the date of the execution of its organization certificate, be a body corporate, but shall transact no business except such as may be incidental to its organization and necessarily preliminary, until authorized by the Comptroller of the Currency to commence *the business of banking.* Such association shall have power to adopt a corporate seal, and shall have succession, by the name designated in its organization certificate, for the period of twenty-five years from its organization, unless sooner dissolved according to the provisions of its articles of association, or by the act of its share-holders owning two thirds of its stock, or unless the franchise shall be forfeited by a violation of this act; by such name may make contracts, sue and be sued, complain and defend, in any court of law and equity as fully as natural persons; it may elect or appoint Directors, and by its Board of Directors appoint a President, Vice-President, Cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss said officers or any of them at pleasure, and appoint others to fill their places, *and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; by obtaining, issuing and circulating notes according to the provisions of this act.*" . . . .

It has been said that this section embodies five distinct grants of power, no one of which operates as a limitation upon the other.

By the *first* grant the bank is authorized to discount and negotiate promissory notes, drafts, bills of exchange, and other evidences of debt; by the *second*, to receive deposits; by the *third, to buy and sell exchange, coin, and bullion;* by the *fourth*, to loan money on personal security, and by the *fifth*, to obtain, issue, and circulate the national currency.

This section 8 of the "National Bank Act" of 1864 is almost a literal copy of section 18 of the act of the New York Legislature, entitled "an act to authorize the business of banking," approved April 18, 1838; and the general features of the two enactments, viewed in their entirety, are practically the same. The congressional statute was modeled upon the State law, so far as the original design and policy of the two pieces of legislation would permit. For the sake of convenience, those parts of these two sections bearing upon the question involved in this cause are transcribed in parallel columns, in order that their similarity may be clearly observed.

ACT OF CONGRESS OF 1864.	ACT OF N. Y. LEGISLATURE OF 1838.
. . . "And exercise, under this act, all such incidental powers as shall be necessary to carry on the business of banking, BY discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; BY receiving deposits; BY buying and selling exchange, coin, and bullion; BY loaning money on personal security; BY obtaining, issuing, and circulating notes according to the provisions of this act." (U. S. Revised Statutes, Sec. 5136, being Sec. 8 of the National Bank Act.)	"Such associations shall have power to carry on the business of banking, BY discounting bills, notes, and other evidences of debt; BY receiving deposits; BY buying and selling gold and silver bullion, foreign coin, and bills of exchange in the manner specified in their articles of association for the purposes authorized by this act; BY loaning money on personal and real security, and BY exercising such incidental powers as shall be necessary to carry on said business." (N. Y. Rev. Stats., 3d Ed., Vol. I, page 755, Chap. XVIII, Sec. 18.)

Prior to the passage of the "National Bank Act" by Congress in June, 1864, the foregoing 18th section of the act of the New York Legislature, passed in April, 1838, had been repeatedly construed by the New York Court of Appeals, and it is well settled that, where terms used in the common law or antecedent statute law are contained in a statute, they should receive that construction which has been affixed to those by the courts previous to the adoption of the last statute. Sec. 17, of Chap. 21, of General Statutes of Kentucky provides that "all words and phrases shall be construed according to the common and approved usage of language; *but* technical words and phrases, and such

others as may have acquired a peculiar and appropriate meaning in law, shall be construed and understood according to such meaning." And the Kentucky Court of Appeals, in the case of Bailey v. Commonwealth, 11 Bush, 690, decided that this statute was merely declaratory of the common law upon that subject. The common law rule is thus stated in Broom's Legal Maxims, page 586. "Where an act of Parliament has received a judicial construction, putting a certain meaning on its words, and the legislature in a subsequent act *in pari materia* uses the same words, there is a presumption that the legislature used those words intending to express the meaning which it knew had been put upon the same words before; and unless there is something to rebut that presumption, the act should be so construed, even if the words were such that they might originally have been construed otherwise." It is therefore confidently claimed that when Congress enacted the "National Bank Act" of 1864, adopting the general outline and characteristics of the "Act to authorize the business of banking," which had been in operation for nearly a quarter of a century in the great commercial and industrial State of the Union—the financial and exchange center of the United States—and using the phraseology of the 18th section of the New York statute in framing the 8th section of the currency act, employed the words with the unmistakable intention that these words and phrases should have the same meaning in the National Bank Act as had been put upon them in the State Bank Act by the highest judicial authority of that State. This position seems to us absolutely impregnable, if any weight whatever is given to reason and authority.

The New York statute was first construed by the Court of Appeals of that State in October, 1852, in the case of Talmage, Prest. of N. A. Trust and Banking Co. v. Pell and others, 3 Selden, 328. The facts were: The North American Trust and Banking Company was a banking corporation organized in July, 1838, under the act of April, 1838, and doing business in New York City. In July, 1839, this bank purchased from the commissioners of the canal fund of the State of Ohio $800,000 of

the six per cent bonds of that State at par, agreeing at the time with the commissioners to pay them, in addition to the purchase price, one half of all the profits that might be realized by the sale of these securities in the markets of London, Paris, and New York. In payment of the purchase price the bank issued its certificates of deposit to Ohio, payable at different periods. Of this sum $200,000 remained due and unpaid on the 22d day of November, 1839, and the bank not being able to pay this sum, an arrangement was made by which it pledged to Ohio certain mortgage notes, etc., it held as collateral security, among which was a mortgage note on Ferris Pell and wife. In delivering the opinion in the case the court say:

"In the most favorable view of the case for the complainants the transactions can only be sustained upon the broad ground that this association and all other banking incorporations have the right, as incident to their business, to trade in stocks and all other personal property for cash or on credit, unless specially forbidden by their charter, and that their contracts, whether in the form of post notes or otherwise, are binding upon the association and the creditors. A claim, therefore, to traffic in stocks as a species of personal property is distinctly asserted by the learned counsel for the complainants under the fourth subdivision of his first point.

"In considering this proposition it may be conceded that this association could purchase stocks to deposit with the comptroller as security for their circulatory notes, that they might invest their surplus funds in them, or loan money upon them by way of discount or when received in pledge, and that, as a consequence, they might lawfully acquire a title to such security when sold to enforce a lien, or by process of law, in order to obtain satisfaction for a debt due the corporation. All these powers are incident to the express power to conduct the business of banking. They have authority to loan money, to become creditors, and must have the right to secure and collect the debts thus contracted. But all this is very different from an unlimited authority to traffic in stocks for any purpose which the directors might deem advantageous to the corporation. This association at the time of this transaction was not seeking to invest their surplus capital, for they had none, but were purchasing as a means of raising money to supply a present exigency. They did not discount the bonds of Ohio, as was intimated in the argument, for this in banking is only a mode of loaning money. They pur-

chased them, as the whole arrangement shows, as a means of borrowing, nor did they obtain the bonds as the basis of an exchange account under the power to buy and sell bills of exchange, even if the right to acquire them for that purpose was given by the 18th section of the law of 1838, because the stocks were held and the proceeds were to be applied by the vendor upon a debt due from the vendee, according to the express terms of the agreement. In a word, they purchased these bonds as they might have purchased a cargo of cotton to send to market to be sold at the risk of the vendor for the highest price that could be obtained. No authority to traffic in either commodity is expressly given by the law of 1838. It is therefore claimed as a power incident to the business of banking. But the 18th section of the act declares that this business shall be carried on *by* discounting bills, notes, and evidences of debt; by loaning money on personal and real security; by buying and selling gold and silver bullion, foreign coin, bills of exchange, etc. The subjects pertaining to the business of banking are designated, and the express powers of the association are limited to them, and to such incidental powers as may be necessary to transact the business *thus defined* by the legislature. . . . .

"The 18th section of the statute of 1838 contains an express grant of power to these associations to deal in bullion, foreign coin, and bills of exchange; in short, authority to deal in certain kinds of personal property and evidences of debt. *State stocks are not mentioned in the section.* If the maxim, *expressio unius*, etc., as complainants insist, is applicable to a prohibition, it certainly should be to a power, more especially when the course of legislation for forty years has denied the power sought to be implied is either necessary or expedient to accomplish the purpose for which banks are instituted. . . .

"I am, for the reasons suggested, of the opinion that this bank had no authority to traffic in stocks as an article of merchandise, or to purchase them for the purpose of selling them." . . .

The judgment of the inferior court was reversed, the court adopting the following decree:

"Such associations are banking corporations, and possess only the authority to carry on the business of banking in the manner and with the powers specified in the act. That they have no power to purchase State or other stocks for the purpose of selling them for profit, or as a means of raising money except when such stocks have been received in good faith as security for a loan made in good faith, or a debt to such associations, or when taken in payment, in whole or in part, of such loan or debt."

These views have been uniformly adhered to by the Court of Appeals of New York, the case *supra* being deemed the leading authority upon that subject. In the case of Tracy v. Talmage, 14 N. Y. 167, decided by the same court in June, 1857, the same question arose, and Judge Selden, delivering the opinion of the court, shut off all discussion by announcing that the case of Talmage v. Pell was decisive of the question, and re-affirmed that decision in the most emphatic and unmistakable terms. This doctrine was again affirmed by that court in Curtis v. Leavett, 15 N. Y. 1–297, and Bank Coms. v. St. Lawrence Bank, 7 N. Y. 513, and Barnes v. Ontario Bank, 19 N. Y. 152.

It will be seen that the contract made by the North American Trust and Banking Company with the State of Ohio was like the contract between the Logan County National Bank and Townsend in two essential particulars. Both of them were partly executed and partly executory. Ohio delivered its bonds to the bank in consideration of $800,000, and the bank's agreement to pay the State one half of the net profits arising from the sale of these securities by the bank in this country and in Europe. All the purchase money was paid in cash except $200,000, and for this balance the bank executed to Ohio its certificates of indebtedness. The action afterward instituted in the Supreme Court of New York involved the question of the bank's liability upon the obligation to pay the State of Ohio one half of the profits of the subsequent sale of the bonds by the bank, and it was expressly decided by the Court of Appeals that the bank was not liable upon either cause of action, the balance of $200,000 purchase money due Ohio for the bonds nor the State's share of the profits of the transaction. The contract was declared void as to both the executed and executory branches thereof, on the sole ground that such a contract was not authorized by the provisions of the "Act to authorize the business of banking." In the case at bar Townsend delivered his bonds to the bank in consideration of $8,000, all they were worth, and in consideration of the bank's agreement, not to pay him one half of the profits of the

speculation, but to sell them back on demand at the same price or at a lower price, at his option. The two cases are as nearly parallel as any two distinct cases can be, the differences, confessedly slight, all being against the validity of defendent in error's claim. If the 18th section of the New York law did not authorize that bank to make the contract with Ohio, it is absolutely certain that the 8th section of the United States law did not authorize this bank to make the contract with Townsend. The two banks derive their powers from a common source. The act of 1838, as judicially construed by the court of last resort in the State of New York, was appropriated, together with that construction by the Congress of the United States in 1864, and conferred precisely the same powers upon every bank organized under it, so far as the operation of section 8 is concerned, as were conferred upon the banks of New York by the law of 1838, so far as section 18 of that law is concerned.

The rule of interpretation here insisted upon has been so universally applied to the legislation of this country, both State and Federal, that it may be properly classified as one of the fundamental doctrines of our law. It is one of the few rules without any exceptions. A few familiar examples will serve to illustrate the extent to which the doctrine has been carried. The Kentucky statute of frauds and perjuries is, in all its essential particulars, substantially the same as the 29th of Charles II, and it has never been denied, so far as we have been able to ascertain, that in enacting that law the legislature of Kentucky intended to employ and did employ the words and phrases and terms of the English statute as they had been construed by the courts of Great Britain. The first English bankruptcy law was passed in the reign of Henry VIII, and when Parliament enacted 32d and 37th Victoria many of the terms and expressions used in the original law were incorporated in the re-enactment. An examination of the decisions of the courts of that country, involving a construction of the last named act, will show that, without exception, wherever the phraseology of the old law had been passed upon by the courts, the meaning thus affixed to these

terms has been adhered to in construing the same terms as used in the new law. And the adjudications of the courts of this country, both State and national, abound with evidences of the wisdom and necessity of this method of interpretation. The phrases used in the United States Bankruptcy Act of 1867, which had been used in the Bankruptcy Acts of 1841 and 1800, have uniformly received the same construction by the courts in deciding questions arising under the modern law as had been imputed to them by the courts in passing upon cases arising under the old law. In other words, it has always been held that the words and phrases of a statute, which have been judicially interpreted, are adopted by the legislature with the design of giving them the same force and effect as they possessed in the former law. The construction of a statute, the substance of which is re-enacted and formulated into a new law, is as much a part of the law as if it had been so declared in terms. We have seen that when plaintiff in error's charter was created in 1864 the 8th section thereof had been judicially construed in effect, which is of itself sufficient, it seems to us, to determine this case favorably to the bank. But fortunately we are not left without direct and conclusive decisions upon the very point at issue. The Court of Appeals of Maryland, the Supreme Court of Ohio, the Supreme Court of Vermont, the Court of Appeals of New York, the Supreme Court of Pennsylvania, and the Supreme Court of Minnesota have all passed upon section 8 of the "National Bank Act," promulgating views, in every instance, in support of the position here assumed, while a painstaking investigation of the authorities has failed to discover any adjudication of any court in this country which announces the opposite doctrine.

In the case of Weckler v. First National Bank of Hagerstown, 42 Maryland 581, which was an action brought by Weckler against the bank to recover $1,000 in damages, upon the plaintiff's allegation that the bank was engaged in the business of selling Northern Pacific Railroad bonds, and had fraudulently induced her to purchase and pay $1,000 for two of these bonds when they were worthless, the court, deciding that the bank was not liable, says, after quoting the 8th section of the act:

"This is the only portion of the statute to which, for the purposes of this case, it is necessary to refer. By it the associations are not simply incorporated *as banks*, and the scope of their corporate business left wholly to implication, but the kind of banking which they may conduct is limited and defined. As we read the language of this 8th section, it authorizes the association to carry on banking 'by discounting and negotiating promissory notes, etc., and to exercise all such incidental powers' as shall be necessary to conduct *that business*. The mode in which the incidental powers may be exercised is not defined, but all incidental powers which they can exercise must be necessary or incidental to the business of banking thus limited and defined. To the usual attributes of banking, consisting of the right to issue notes for circulation, to discount commercial paper and receive deposits, the law adds the special power to buy and sell exchange, coin, and bullion; but we look in vain for any grant of power to engage in the business charged in this declaration. It is not embraced in the power to *discount and negotiate* promissory notes, bills of exchange, and other evidences of debt. The ordinary meaning of the terms 'to discount' is to take interest in advance, and in banking is a mode of loaning money. It is the advance of money not due till some future period, less the interest which would be due thereon when payable. The power to *negotiate* a bill or note is the power to endorse and deliver it to another, so that the right of action thereon shall pass to the endorsee or holder. No construction can be given to these terms, as used in this statute, so broad as to comprehend the authority to sell bonds for third parties on commission, or engage in business of that character. The appropriate place for the grant of such a power would be a clause conferring authority *to buy and sell*, but we find that limited to specific things, among which bonds are not mentioned, and upon the maxim *expressio unius est exclusio alterius*, and in view of the rule of interpretation of corporate powers before stated, the carrying on of such a business is prohibited to these associations. Nor can we perceive it is anywise necessary to the purpose of their existence, or in any sense incidental to the business they are empowered to conduct, that they should become bond brokers, or be allowed to traffic in every species of obligations issued by the innumerable corporations, private and municipal, of the country. . . . Such is our construction of this statute, and it is supported by the best considered authorities and the decided preponderance of judicial opinion in other States."

The learned judge adds:

"We are therefore clearly of the opinion that this business of selling bonds on commission is not within the scope of the

powers of the corporation, and the bank could not, under the circumstances, carry it on, and, being thus beyond its corporate powers, the defense of *ultra vires* is open to the appellee."

It will be observed that in the case here cited the bank actually received the money for bonds that were of no value, that an actual hardship rested upon the plaintiff by reason of its action, but that, notwithstanding the strong equity existing in her favor, the court refused to grant her any relief at the sacrifice of the just and correct administration of law. In the case at bar Townsend has suffered no loss, has sustained no injury, has incurred no risk. He received full value for his bonds when he sold them, and the application of the rule applied in the Maryland case can be made to him without inflicting any evil whatever upon him.

In the case of First National Bank of Rochester v. Pierson, Albany Law Journal, vol. 16, 319; s. c., Thompson's National Bank Cases, 637, the Supreme Court of Minnesota decided that the *purchase* of a promissory note by a national bank for the purposes of speculation was *ultra vires*, and that no action could be maintained upon it by the bank. This decision is a specific construction of section 8 of the "National Bank Act," but it is interesting to note that the same court had previously construed section 13 of chapter 92 of the Minnesota Revised Statutes (a literal transcript of section 18 of the New York statute of 1838) according to the doctrine of the New York Court of Appeals as hereinbefore stated, and based its opinion in the case above cited upon the reasoning and authority of that decision—Farmers & Mechanics Bank v. Baldwin, 23 Minn. 198.

In the case of Wiley v. First National Bank of Brattleboro, 47 Vermont, 546, the Supreme Court of Vermont, in deciding that a national bank is not liable for loss of special deposits, discusses very ably and logically the legal meaning of section 8 of the "National Bank Act." One of the five grants of power conferred upon these associations is the right to carry on the business of banking "*by receiving deposits.*" But the power to receive *special* deposits is not given, and the court held that the

receiving of special deposits was not in any sense necessary or incidental to the business of banking, and that no action was maintainable against a national bank for loss of such deposits. The doctrine of this case was approved by Allen, J., who delivered the opinion of the Court of Appeals of New York in First National Bank v. Ocean National Bank, 60 N. Y. 279, although other courts have held that these associations are liable for gross negligence in keeping such deposits where the practice of receiving them has grown into a custom.

The general rule, deducible from all the authorities, may be summed up as follows: Banking corporations organized under the "National Bank Act" can exercise only such powers as are expressly granted in the act of incorporation, and such as are necessary or incidental to the business of *banking*, and that the right to traffic in bonds or stocks is not conferred by the charter and does not exist as one of the inherent or incidental powers of such associations. (Talmage v. Pell, 7 N. Y. 327; Bank Commissioners v. St. Lawrence Bank, 7 N. Y. 513; Curtis v. Leavitt, 15 N. Y. 1–269; Tracy v. Talmage, 14 N. Y. 167; Barnes v. Ontario Bank, 19 N. Y. 152; First National Bank v. Ocean National Bank, 60 N. Y. 279; Weckler v. First National Bank of Hagerstown, 42 Maryland, 581; First National Bank of Rochester v. Pierson, Albany Law Journal, Vol. 16, 319; s. c., Thompson's National Bank Cases, 637; Farmers & Mechanics Bank v. Baldwin, 23 Minn. 198; Wiley v. First National Bank of Brattleboro, 47 Vermont, 546; Morse on Banks, 4; Section 8, National Bank Act.)

This question has been collaterally before this court, and the outgivings of the court leave no doubt upon the mind as to what its decision will be upon the direct issue. In the case of First National Bank of Charlotte v. National Exchange Bank of Baltimore 92, U. S. 122, in affirming the corporate power of a national bank to buy in railway stocks and shares of a coal mining company in *order* to *compromise and secure* a previously existing debt then about to be lost, the court, Waite, Ch. J., delivering the opinion, says, speaking of the 8th section:

"Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. . . . Loans or discounts may be made that can not be met at maturity. Compromises to avoid or reduce losses are oftentimes the necessary result of this condition of things. These *compromises* come within the general scope of the powers committed to the board of directors. . . . Dealing in stocks is not expressly prohibited, *but such a prohibition is implied from the failure to grant the power.* In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in *payment and satisfaction with a view to their subsequent sale or conversion into money,* so as to make good or reduce an anticipated loss. *Such a transaction would not amount to a dealing in stocks.*"

The court significantly adds:

"Of course, all such transactions must be *compromises in good faith,* and not mere cloaks or devices to cover unauthorized practices."

This case was an appeal from the Court of Appeals of Maryland, and the judgment of the State Court was affirmed, thus showing that section 8, as applied to the incidental power of these corporations to *compromise* a pre-existing debt by accepting stocks for conversion into money was properly construed by the same court which decided in Weckler v. First National Bank of Hagerstown, *supra,* that under that section the power to *traffic* in bonds was not granted in express terms or by implication, and did not exist as one of the inherent powers of these banks. We are not unmindful of the fact that national banks are expressly prohibited from loaning more than one tenth of their capital stock to any one person, and are also prohibited from loaning money on *real estate* security, and that notwithstanding these prohibitions this court has decided that loans in excess of one tenth of the capital are valid (Union Gold Hill Mining Company v. Rocky Mountain National Bank, Thompson's National Bank Cases, 152), and that a mortgage on real

estate executed to secure a contemporaneous loan is enforceable. (Union National Bank *et al.* v. Matthews, 98 U. S. 658.) But these adjudications rest exclusively upon the ground of public policy, and the reluctance of equity to inflict a penalty or work a forfeiture. These cases hold that the prohibitions were intended to operate as rules for the government of the bank, and not to prejudice transactions otherwise legitimate and made in good faith. The only effect of these decisions was to place the parties *in statu quo*. The contracts in these cases were *executed*. Will it be seriously argued that the doctrine of these cases will authorize the court to enforce the terms of an *executory* contract specifically prohibited by law or impliedly unauthorized? If a national bank were to enter into an agreement to loan one person an amount in excess of one tenth of its capital stock, would not the plea of *ultra vires* be an effectual barrier to any suit growing out of the agreement?

To coerce the payment of a loan in excess of the maximum limit operates to protect the interest of stockholders without visiting the slightest hardship upon the borrower, and the same may be said of the effect produced by the enforcement of a mortgage lien on real estate. No damage can result to the payor or mortgagor, or, if any, it is at best mere *damnum absque injuria*. These inhibitions were engrafted upon the law, not for the benefit of either party to the illegal contract, but altogether upon grounds of public policy, as was said by this court in Harris v. Runnells, 12 How. 79, holding that when a statute provided that slaves should not be brought into a State without a certificate previously signed by two freeholders, and slaves were brought in and sold without such certificate, the contract of sale is not void, but the purchaser must pay his note given for the purchase money.

The complaint in the case now before the court is founded upon a totally different ground from that underlying any of these adjudications. We do not deny that if Townsend had surrendered his bonds to the bank upon its promise to pay him their value at a future day in money, the plea of *ultra vires* in defense

of a suit to recover the bonds or their value, although, strictly speaking, available, would be somewhat unconscionable, because the corporation, regardless of its chartered privileges, should be estopped from doing a dishonest act. It should not keep his bonds without paying him for them. But having paid him their full market value, having given him the means to go into the open market and replace them at pleasure, no rule of equity or demand of conscience ought to exact the performance on its part of an executory agreement, wholly one-sided, wholly without consideration, wholly vicious, and overwhelmingly condemned by the judicial opinion of the country. We submit this branch of the case with the utmost confidence in the strength and fairness of the argument here made. If corporate power should ever be confined within the sphere of action defined by "the charter of their creation" the rule should be strictly applied to this cause.

Passing from the consideration of this branch of the subject, let us take up another question of considerable importance. The bank's assignment of errors (and the bill of exceptions herein warrants the complaint) recites that the Circuit Court erred to its prejudice by entering the "order and judgment" of January 29, 1884, whereby the original judgment for $4,416, the amount claimed in the petition, was set aside, and in lieu thereof another judgment was entered for $4,032. The jury returned a general verdict in these words, "We, the jury, find for plaintiff," without assessing the amount of recovery, and also returned special findings to the effect that Townsend sold the bonds to the bank, and not to Barclay individually, and that the terms of the trade were "that defendant would replace the bonds to the plaintiff at price paid at that time, or less." The jury not only failed to assess and fix the amount of recovery, but failed to find what price the bank paid for the bonds at the time of the alleged purchase. Upon the return of these findings the court immediately entered up judgment for $4,416, but afterward set aside this judgment on its own motion, alleging as a reason that it was for too much, and in place of it gave judgment for $4,032—the difference between the value of $12,800 of bonds at 68½ cents and

their par value. This was clearly erroneous, as was urged at the time without success, for the reason that the court arbitrarily assumed, in the face of the evidence, that the bank only paid 68½ cents for the bonds. Townsend distinctly testified that he got 68½ cents on the dollar for $6,800 of his bonds, and 69 cents on the dollar for $6,000 of them. His written statement to that effect was in evidence. His unconditional oral assertion from the witness-stand was to the same effect. Barclay's written statement was in evidence that he paid him about 69 cents for all of them, and in his deposition he stated that he paid between 68 and 70 cents for them. This was all the evidence on that point. The Civil Code, subsection 4 of section 126, providest hat "allegations of value or amount of damage" must be proved, even though not traversed. But this allegation was expressly denied in the answer. Townsend's own evidence showed that he had received 68½ cents for $6,800 of his bonds, amounting to $4,658, and 69 cents for $6,000, amounting to $4,140, making an aggregate sum of $8,798, and that according to his own showing he was only entitled to the difference between $12,800 and what he had received, $8,798, which difference was $4,002. The court erred to plaintiff in error's prejudice by rendering judgment for $4,032, thirty dollars in excess of the amount proven. For this fatal error, if for none of the innumerable graver ones, the motion for a new trial ought to have been sustained, or rather the judgment should be reversed by this court, as that error was committed after the motion for a new trial had been overruled. When the legislature of Kentucky enacted section 329 of the Civil Code, providing that

"If, by a general verdict, either party be entitled to recover money of the adverse party, the jury, in their verdict, *must assess the amount of recovery*," must have foreseen, with the eye of prophecy, this lamentable failure of the judge to guess at what the jury would have done. No case better illustrates the wisdom and necessity of that provision, or more conclusively demonstrates precisely what the law-making power had in view in the passage of that statute.

One of the errors assigned is the failure of the jury to assess the amount of recovery. This was one of the grounds relied on for a new trial, resting upon this section of the Code. This section is identically the same as section 359 of Myers' Code, and the Kentucky Court of Appeals, in Cooper v. Poston, 1 Duv. 94, the only case we have been able to find bearing upon the question, decided that in an action on *a note* for a certain sum of money, where the only defense was a plea of usury, a verdict for the plaintiff, without fixing the amount, authorized the court to render judgment for the whole sum sued for, as shown by the face of the note, say: "Questions relating to value and damage are questions of fact. As a general rule, in cases involving such questions, the jury *must assess the amount of recovery.*" This case is within the description mentioned above. It was an action for damages, the amount of which depended upon the evidence. It was peculiarly the province of the jury to ascertain and return into court the exact amount to which, under the proof, Townsend was entitled. Their omission to do so was a surrender of one of the jury's chief functions to the court, which in this case exercised it in such a way as to exemplify the folly of the practice. The case of Noel v. Hudson, 13 B. M. 204, has no bearing whatever upon this question, and is merely referred to here because it was cited by defendant in error's counsel in argument in the lower court.

The plaintiff in error further complains in its assignment of errors, that the lower court erred to its prejudice in sustaining plaintiff's special demurrer to the 5th paragraph of the answer, which paragraph set up by way of defense that Barclay had no authority as cashier to make the contract, and that the bank under its charter had no power to make it. Having previously discussed this question in treating of the defendant's general demurrer to the petition, it is unnecessary to reiterate here what was said in that connection. But this paragraph seems to us to be clearly good, and we invite attention to its averments as being sufficient in law.

In refusing to give instructions No. 9, No. 12, and No. 13, asked for plaintiff in error, the court erred to its prejudice. No. 9 is as follows:

"That the defendant is a National Banking Association, capable of exercising only such powers as are expressly or impliedly conferred upon it by its act of incorporation, and that the power to buy and sell municipal bonds for purposes of speculation, or to engage in the purchase or sale of such securities for the purpose of manipulating or controlling their market value, is not conferred upon the defendant bank by the provisions of its charter, and that if the jury believe from the evidence that the cashier, Barclay, paid Townsend the full market value for his bonds and bought them for the sole purpose of enabling him or the bank to manipulate or control the price of said bonds in the market for speculative purposes, they must find for defendant, *provided* they shall believe that the plaintiff at the time knew that the bonds were to be used for such purposes."

It is impossible to conceive upon what legal theory the court based its refusal to give this instruction. It is neither abstract nor misleading, as a very superficial examination of the evidence will show. Its rejection by the court served to emasculate the defense, and was almost tantamount to a positive command to the jury to find for the plaintiff regardless of the facts put in evidence by the bank. The well-established principle of law underlying this instruction was so carefully stated with reference to the facts proven on the trial, that we believe its refusal by the court was as much a matter of astonishment to the opposing counsel as it was a matter of disappointment and wonder to those charged with the conduct of the defense. The jury were thus practically informed that under the law there was no difference between a natural person and an artificial person—between an individual and a corporation; that the powers of the one were co-extensive with the other; that a national bank could do whatever a natural person could do; that acts of incorporation were mere nullities; that a bank organized and existing under the "National Bank Act" derived all the powers possible from the Congress that created it, and any additional powers that it might thereafter choose to usurp and exercise, from the sovereign will of its cashier or the stock-

jobbing schemes of persons desiring to use its commercial influence and authority, as well as the property of its shareholders, to achieve their selfish and dishonest aims. We frankly concede the frequent abuse of the doctrine of *ultra vires*, and admit with equal candor the justice of the law of *estoppel;* but stockholders and depositors have rights guaranteed by law and sanctioned by conscience which ought to find at least occasional shelter beneath the shield of the one when resisting the unjust and unlawful assaults of the other. Townsend is as much bound by the provisions of the "National Bank Act"—a law covering the entire country, in all its length and breadth, of universal dominion and application, differing as widely from the ordinary bank charter as the parliamentary statute creating the East India Company differs from the charter of an obscure village in the remote provinces of Great Britain—as the shareholders of the bank are bound thereby, and the jury should have been told plainly and intelligently the extent and nature of the legal disabilities resting upon the plaintiff in error by virtue of corporate being, just as they *would* have been told, with consummate pains-taking, the character and significance of its legal disabilities by reason of *coverture*, or *infancy* or *lunacy*, if it had been the happy fortune of this institution, at the time of the trial, to occupy any one of those legal vantage grounds. In actions *ex contractu*, as in this case, the pleas of coverture, of infancy, of lunacy, all of which are pleas of *ultra vires* pure and simple, are always available, and upon the same principle the plea of corporate disability, properly guarded, is in law entitled to the same weight. Suppose Townsend had made this contract with a married woman owning a general estate. Her plea of coverture would have sent him out of court. Her simple statement that she had no legal capacity to contract would have baffled all his efforts to recover, and he would not be permitted to say that he was ignorant of her disability or that justice demanded the subjection of her property to the payment of his claim. Her want of power to contract exists by reason of the law's desire to protect her from the consequences of her own folly and inexperience, and the limitations upon corporate powers

are fixed with a view to protect shareholders from the inconsiderate and reckless operations of officers and servants, through whom the business of the association is necessarily conducted. This instruction informed the jury that, while the *executed* contract might stand, while the payment to Townsend by the bank of the full market value of his bonds might be deemed valid, yet the bank had no power to engage in speculations, in gambling on the future, in entering into schemes looking to the control and regulation of prices, giving Townsend the benefit of the reservation, to which he was not really entitled; that unless he knew that the bonds were to be used for such unlawful purposes the jury might find for him notwithstanding these things.

Other instructions were refused by the court, as appears from the record, and but for the great length of this brief we might point out the errors thus committed in detail. In modifying nearly all of the defendant's instructions and in giving those asked for by plaintiff, we submit that many grave mistakes were made, and without consuming further time in pointing them out in detail we direct the attention of the court to the record, with the hope and belief that a critical examination thereof will result in a reversal of the judgment.

One of the grounds relied on by the bank in the lower court for a new trial was that "the verdicts, general and special, were not sustained by sufficient evidence," and it seems perfectly clear to us that on this ground the motion ought to have been granted. Without entering minutely into the argument of the facts, as was done in presenting the case to the jury, we feel that our duty to the cause we represent, as well as to the court whose supervisory jurisdiction we have invoked, will be but imperfectly discharged unless we show, as can easily be done, the utter absurdity of the verdicts. The learned special judge who presided in the Circuit Court declined to give a peremptory instruction at the conclusion of the plaintiff's evidence, for the reason that, in his opinion, where there was "a scintilla of testimony" conducing to support the cause of action, the case should be left to the jury; and he refused to disturb the verdict after it was brought in, on the

ground that the jury were the exclusive judges of the evidence; and that having found the facts to be as incorporated in their findings he would assume them to be true. His reasoning was illogical, for the reason that his premises were correct only in a modified sense. It is, under our system of practice, as much the province of the judge to vacate an erroneous verdict, or even to enter up judgment *non obstante veredicto*, when the interests of justice or the due administration of law require it, as it is to perform any other function of the judicial office. He is not a mere figure-head, clothed with naked authority to sit and receive and order to record any and every thing that a jury, in their inexperience and frequent incapacity to unravel and nicely discriminate between the true and the false, the relevant and irrelevant in evidence, may be induced to bring into court. No one suspects for a moment that any member of the jury trying this case was moved by any dishonorable or unworthy motive; but it is claimed, and of that this court will take judicial knowledge, that they were summoned and impanneled in the usual way in which juries in the country circuits are obtained; that they were men engaged exclusively in agricultural pursuits, totally without any knowledge or experience in mercantile or banking affairs, naturally disqualified, by reason of their past lives and modes of transacting business, for the difficult task of sifting and appreciating the complex and intricate details of book-keeping as practiced in banks, of comprehending the effect of entries and recitals upon their records, the significance of inter-bank accounts, and the numberless devices employed by experts in the "business of banking" to make the current history of their operations so accurate that at the close of a fiscal year accounts involving hundreds of thousands of dollars shall balance to the fraction of a cent.

Submitted to a jury of this kind, misled by such instructions and rulings as abound in the record, it is no wonder that the undisputed and incontrovertible facts of this case were left out of consideration in the formation of the verdict.

(1) The contract involved over $8,000, and a material part of it was to be executed in the future, and not a line of it was

reduced to writing. The very improbability of the story is enough to condemn it. Is it probable that Townsend would deliver his bonds, would receipt to the bank for the $6,800 of bonds he had on deposit and give them to Barclay, upon his mere verbal promise that the bank would replace them at any time in the future on his demand at the same price or at a lower price? It is true that both Townsend and Hugh Barclay, jr., swear that this was the trade; but when Barclay's animus and unhappy mental derangement, and Townsend's gross and irreconcilable contradictions, and the *letters* he wrote touching the matter are all considered, the conclusion is irresistible that the trade, as alleged, was never in fact made at all. The defendant in error thus states the terms of the sale:

"I came up shortly afterward and went to the bank and saw him (Barclay). He said he had taken the liberty of selling $6,800 in Logan County bonds that I had on deposit in the bank in Louisville at 68½, and that if I wished it he would replace them at the same or a lower price. I told him it was all right. He said he could get 69 for the $6,000 in bonds I brought up that day, and that he would replace them at the same or a lower price. I sold the bonds to the defendant."

This was the way he put it on direct examination. When cross-examined he said this:

"When I came up with my bonds and saw Barclay he said the bonds were fluctuating in the market; that he thought the present price a good one; he believed they would go lower; that he felt so confident of this he was *almost willing* to guarantee it. This was about all that was said at the time he bought my bonds, and is the substance of the contract made between us at the time I sold him my bonds. I did not ask him whether he was acting for himself or the bank; *took it for granted* he was acting for the bank."

And again, he strangely confuses matters by this extraordinary admission under the fire of cross-examination:

"If Logan County bonds had gone to 25 cents on the dollar I would have felt bound to take them back and paid 69 cents for them, if Barclay had asked it. I would have felt bound *because this was part of our* contract."

Hugh Barclay, jr., in reply to a question by the bank's counsel, on cross-examination, thus states the agreement:

"I do not recall that I promised him (Townsend) any thing more than the price made, but advised him to sell, because I thought the bonds would decline; and if he wanted to he could buy them in at a lower price."

Couple these two significant declarations with Townsend's other statement made while testifying in chief: "I had a conversation that day (the day of the trade) with W. F. Browder, president of the bank, and he advised me to make the trade; he said the bonds would, in his opinion, go down, as an article would appear in the next issue of the town paper tending to depress them" (which conversation is not remembered by Browder), and it is wholly impossible to believe that Townsend did more than consent to a sale of his bonds by Barclay, under the belief that these securities would decline in value, and he would be able to re-invest his money in them at lower figures. Why should a transaction of this magnitude and character be made within calling distance of the president, and he be left ignorant of it? Why did not Townsend, in his pretended talk with the president that day, mention the terms of the agreement? Why should the president advise him to sell, giving as a reason, according to Townsend's evidence, that they would go lower, and that efforts to depress them were then on foot? What interest had he in their fluctuation? If he was to get them back at 68½, regardless of fluctuation, what cared he for the future state of the market? or if, as he says, he was bound to take them back at 68½ cents, if they went to 25 cents, how could the president's assurance that they would go down induce him to sell at 68½ cents merely to furnish him an opportunity of returning and paying 68½ cents for them when they had declined to 25 cents?

The annals of the world's commerce afford no counterpart to this piece of simon-pure, unadulterated, unapproachable stupidity.

"None but itself can be its parallel."

Evidence must be construed as statutes or written instruments are interpreted; the meaning must be gathered from the whole body of the testimony, and must be construed strictly against the party in whose interest it is offered. Read all the testimony of Townsend and Barclay, including the letters and written statements copied in the record, and apply to it as a whole the rule of interpretation mentioned, and it seems that no unbiased mind can for a moment believe that any such trade as defendant in error sets up was ever made.

But assuming that it was, was Barclay or the bank the contracting party? The facts exonerating the bank from all participation in this asinine transaction are simply overwhelming. A bank speaks through its books. The very constitution and nature of its organic being require this. Every thing it does, from the payment of its janitor for removing the dust from its counters to the negotiation of financial business involving thousands of dollars, must of necessity assume the form and shape of written history. Its operations can not survive a violation of this law of its existence. In this case the uncontradicted evidence (save by Barclay) is that neither in June, 1879, nor at any other time in that year was the bank engaged in buying or selling bonds. Its "Bond and Stock account"—where all such transactions were recorded—reveals the fact that in that entire year only one bond ($500) was bought or sold by it. Its president, directors, and other officers (always excepting Mr. Hugh Barclay, jr.) all testify that it was not interested in the purchase or the sale or the manipulation of bonds of any character, and its books corroborate their sworn statements. But was Hugh Barclay engaged in buying or speculating in them? Many witnesses say that he was, and the books of the bank not only show that he was, but that he bought and paid for these identical bonds with his own money. The proceeds of the $6,800 in bonds, which "he took the liberty of selling" for Townsend, were placed to Hugh Barclay, jr.'s individual account in the bank. The proceeds, the $6,000 in bonds which he sold a few days afterward, were placed to that same account. The money he paid Townsend for these bonds was

taken from that account by his charging himself thereon with the amount so paid him, and crediting Townsend's account by the same sum on the same day. Can any thing be more complete? Can human conduct speak more distinctly? Does this read like the record of a bank's corporate action, or like a leaf torn from the volume of Barclay's private business life? His bungling attempt to explain away these ineffaceable figures may serve to excite pity for the man, but can not operate to illuminate the evidence of the witness. He says that about the time he sold Townsend's bonds he sold about $40,000 in bonds of the same series; but does he dare say that he sold any of all these, save Townsend's, for the bank, or that the bank had bought any of these, either conditionally or unconditionally? Does not the evidence convincingly show that he handled all these bonds on precisely the same terms, for precisely the same purpose, under precisely the same authority? Holders became panic stricken, and, having faith in his financiering, gave him the privilege of selling for them whenever he deemed it best for them that they should be sold. This view is founded on the documentary evidence furnished by the bank. Townsend's correspondence and the written statement of his claim given by him to W. F. Barclay, as "the representative of his brother Hugh," after Hugh's paralysis and before Hugh's insolvency was announced, forge a chain of proof too strong to be snapped asunder even by the very able and versatile swearing of the defendant in error and the man who vowed in his wrath that he would ruin the bank. We earnestly invite the court's attention to these letters. When Mr. Buchanan said that he would rather tunnel a mountain in order to see a man than to write him a letter, he not only gave utterance to a profound political maxim, but one equally worthy of consideration at the hands of those who madly rush into law for the redress of grievances they have never suffered or the vindication of rights they have never enjoyed. In every thing Townsend said or did or wrote up to the time he learned that Hugh's estate was bankrupt, and that there was no hope of recovering any thing by proceeding against him, shows in unmistakable terms that this arrangement,

whatever it was, was a personal one with Barclay, to which the bank was a stranger. Hugh himself, even in the statement he gave Townsend, December 14, 1880, reciting the terms of the agreement, says that he thought it "a good investment for *me*," which, when considered in connection with the proof that Barclay was in June, 1879, engaged in bond speculations, and that the bank was not so engaged, leaves no room to doubt that Townsend dealt altogether with the man and not with the cashier, and his subsequent conduct, up to the time Barclay's insolvency was discovered by him, demonstrates that Townsend himself knew that he and Barclay were the contracting parties, and that the bank had no interest in their schemes. The bank up to this time rested in security, because its liability was not at all necessary to enable the defendant in error to collect his fraudulent claim. But when he learned that Hugh was no longer pecuniarily able to respond to his call, and that he was about to be stripped of the power to coerce his demand from the estate of the unfortunate paralytic and lunatic, he turned his eyes upon the coffers of the bank and began that shameless career of perversion and prevarication which has not only served to achieve the temporary triumph of wrong and injustice, but also to illustrate the wonderful fertility of his resources and his reckless contempt for honor and conscience. Baffled in his bold endeavor to use Barclay as the direct object of his attack, he shrewdly determines to utilize him as a witness to fix the responsibility, originally designed for him, upon the bank against which and whose officers the deranged and deposed cashier had sworn eternal vengeance—a deliberate purpose to coin into gold the unreasoning and unbridled passions of the man whose many misfortunes had at least the one merit of rescuing him as the intended victim of this soulless rapacity! He perfected his plans with the cunning of an adept, and executed them with the consummate skill of an expert. He waited until he had been assured by W. F. Barclay, Hugh's brother, and his successor as cashier, that Hugh had softening of the brain; and until he had learned that the unhappy man had deserted his wife and children, had become embittered toward his associates and friends, had taken up

his residence at the hotel, was unattended by any of his family or former companions, and was, as a jury of his neighbors, a few weeks afterward declared, of unsound mind. With a full knowledge of all these things, as he himself frankly confesses on the witness-stand, Townsend sought a private interview with him at his room in the hotel, and procured from him the little paper filed with his petition, and about which his hopes in this case so fondly cling. On the 10th of December, 1880, Hugh wrote the remarkable letter, copied in the record, addressed to his brother, W. F. Barclay, wherein he said that he intended to ruin the bank, and four days afterward, December 14th, he began his work of destruction by giving Townsend the paper sued on. This sequence was not fortuitous. It carries along with it the evidence of premeditation.

That Townsend's claim is a pure fabrication is further shown by Hugh Barclay's statement to Capt. W. W. Lyles at the St. Joseph's Infirmary, Louisville, in the fall of 1882. Capt. Lyles says:

"Barclay told me that Townsend had no claim or case against the bank, and that if he had remained at the head of the bank Dr. Townsend never would have brought suit. He also told me that Townsend got scared when the bonds went so low, and drew out his money and sent it to Hopkinsville to buy tobacco."

Barclay does not deny having said this. He says that he does not remember ever having said it. Lyles is positive that he did. Barclay simply fails to remember whether he did or not. Lyles is altogether indifferent, a disinterested witness, while Barclay has shown himself to be anxious for the downfall of the bank. Under the rule of law, which statement is true? Besides, is not that criticism of Townsend's course, cruel though it be, in strict keeping with the previous maneuvers of that protean litigant, whose deftness in changing base is only equaled by the subtle power of the chameleon to change its hues to harmonize with the lights and shadows of its environments.

That the transaction was wholly with Barclay *in propria persona*, and that he and Townsend were jointly interested in an

effort to control the bond market for purposes of gain, is further shown by what Townsend told W. F. Barclay while he was organizing his campaign against Hugh. He said to W. F. Barclay that Hugh wanted to get his bonds so as to secure his influence with one of the magistrates in voting upon the question of levying the tax to pay interest on the bonds; he said to W. W. Lyles that he had agreed with Hugh to see and influence this magistrate, and further that he had seen and got him to promise to vote as desired. What he said to Mr. L. C. Garrigus will never be known; for when that gentleman was asked if Townsend did not tell him that he was engaged with Barclay in an effort to depress the bonds, and that he had sold his bonds and Hugh was to tell him when to buy back, the witness claimed that Townsend's statements to him were privileged communications between client and attorney, and he was excused by the court, with the consent of Townsend. Privileged communications are never concealed except when their disclosure will embarrass or condemn the party shielding himself behind them. These are but a small part of the great body of facts appearing in the record which tend to show the utter groundlessness of Townsend's claim. The limits of this brief, already too long, will not permit further treatment of this view of the case; but we earnestly appeal to the court to examine the evidence in all its fullness, and then to decide whether or not the jury's conclusions were warranted by the proof.

Regretting the necessity which seemed at least to demand so tedious an examination of the questions of law and fact disclosed by this record, we submit the cause, respectfully and confidently insisting that the judgment of the Circuit Court be reversed.

WILBUR F. BROWDER,

Counsel for Plaintiff in Error.

RUSSELLVILLE, KY., DEC., 1890.

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OCTOBER TERM, 1890.

No. 170.

THE LOGAN COUNTY NATIONAL BANK,
PLAINTIFF IN ERROR,

vs.

R. P. TOWNSEND.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF OF JOHN FELAND,

Counsel for Defendant in Error.

WASHINGTON, D. C.,
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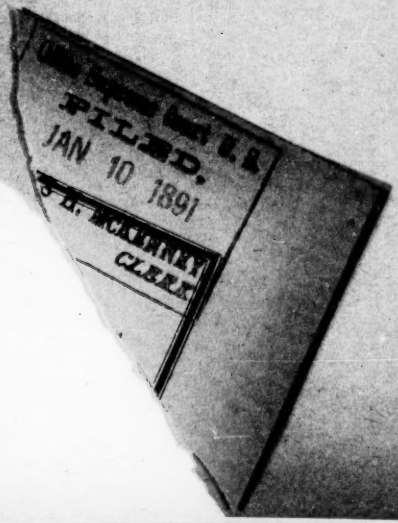
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No. 170.

THE LOGAN COUNTY NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

R. P. TOWNSEND, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

Counsel for defendant in error will omit any detailed statement of the facts in this case, being content with calling the attention of the Court, in the course of the discussion of the law, to an occasional mistake or omission of the counsel for plaintiff in error in stating the facts in his brief.

It was intended at first, also, to pass without notice such questions discussed by the counsel in his brief as are not considered within the jurisdiction of this honorable Court; but the counsel presses these matters with so much earnestness that I have concluded that it would be at least respectful to him, if I did not enter fully into the controversy about these matters, to go so far as to explain why I did not.

I have heretofore read with interest the clear and forcible opinion of Mr. Justice Miller in the celebrated case of *Murdock vs. Memphis*, 20 Wall., 590, and, upon referring to it again, I am impressed more than ever with its sound reasoning and distinct fullness. It seems really to embrace nearly every principle applicable to this case, and if counsel for plaintiff in error had carefully considered and been guided by it in the discussion he would have saved himself a great deal of unnecessary labor.

Discussing the effect of the act of 1867 upon the jurisdiction of this Court upon writs of error to State courts the Court says:

"When it appears that a Federal question exists in the record, and that it was decided erroneously against the plaintiff in error, we must then reverse the case undoubtedly, if there are no other issues decided in it than that. It often has occurred, however, and will occur again, that there are other points in the case than those of Federal cognizance, on which the judgment of the court below may stand, those points being of themselves sufficient to control the case."

Then, in discussing the effect to be given to those points not of Federal cognizance, the Court continues:

"Why should a judgment be reversed for an error in deciding the Federal question if the same judgment must be rendered on the other points in the case, and why should this Court reverse a judgment which is right on the whole record presented to us or when the same judgment will be rendered by the court below after they have corrected the error in the Federal question?

"We have already laid down the rule that we are not authorized to examine those other questions for the purpose of deciding whether the State court ruled correctly on them or not. We are of opinion that on these subjects not embraced in the class of questions stated in the statute we must receive the decision of the State courts as conclusive.

"But when we find that the Federal question has been decided erroneously, then to prevent a useless and profitless reversal, which can do the plaintiff in error no good and can only embarrass and delay the defendant, we must so far

look into the remainder of the record as to see whether the decision of the Federal question alone is sufficient to dispose of the case or to require its reversal; or, on the other hand, whether there exist other matters in the record actually decided by the State court which are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the Federal question. In the latter case the Court would not be justified in reversing the judgment of the State court.

"But this examination into the points in the record other than the Federal question is not for the purpose of determining whether they were correctly or erroneously decided, but to ascertain if any such have been decided and their sufficiency to maintain the final judgment as decidad by the State court.

"Beyond this we are not at liberty to go, and we can only go this far to prevent the injustice of reversing a judgment which must in the end be reaffirmed, even in this Court, if brought here again from the State court after it has corrected its error in the matter of Federal law."

These principles thus laid down have been approved by this Court in a number of cases subsequently decided, notably in the case of *Chapman vs. Goodman*, 123 U. S., 540; *Brooks vs. Missouri*, 124 U. S., 394; *Kreiger vs. Shelby Railroad Co.*, 125 U. S., 45; *De Saussure vs. Gaillard*, 127 U. S., 216, and *Beattie vs. Benton*, 135 U. S., 244, and has not to the knowledge of the writer been departed from in any case described, either before or since.

If this be the law it seems to be proper first to examine the record and ascertain clearly what questions presented in it are to be considered by this Court. This will save much time and trouble, if not to the Court, to the counsel engaged.

The counsel for plaintiff in error has quite clearly, and we think fairly, stated in order, on the second page of his supplemental brief, the points relied on by the plaintiff in error in its defense to the action in the circuit court of Logan county, Ky., where the action was originally brought. These points were:

(*a.*) A denial of the contract sued on.

(*b.*) The contract, if any was made, was one between the cashier of the bank (plaintiff in error), acting for himself and not for the bank, and the defendant in error.

(*c.*) The contract was void for want of consideration.

(*d.*) It was void for want of mutuality.

(*e.*) That the contract was not within the scope of the cashier's powers, and therefore not binding on the bank.

(*f.*) That the contract was *ultra vires.*

I do not mean to admit that these matters were sufficiently pleaded or presented to the Court, but only that these are all the matters the plaintiff in error attempted to rely on in the court below.

The Court will perceive at once that the two first points relied on by plaintiff in error are purely questions of fact for the jury to decide, and which were in fact decided by the jury; and as we understand the rulings of this Court upon writs of error to the courts of the United States, the Supreme Court will not consider such a question, because they regard the finding of the court below as to facts conclusive upon them (*Norris vs. Jackson*, 9 Wall., 127; *Insurance Co. vs. Lea*, 22 Wall., 160). When applied to writs of error to State courts this rule will only be relaxed to meet the practice which prevails in the State court (*Melendy vs. Rice*, 94 U. S., 796). The rule of practice in Kentucky is that the court of appeals will not reverse and grant a new trial on the ground that the verdict is against evidence unless it be clearly and flagrantly so (*Page vs. Carter*, 8 B. M., 192; *Moore vs. Foster*, 10 B. M., 196). In accordance with these decisions, which have been the rule of practice in Kentucky ever since it became a State, the court of appeals in its opinion (see page 71 of the printed record) says: "As the testimony of both appellee and H. Barclay, Jr., tend to sustain the special as well as the general verdict, we cannot say they are palpably against the evidence, and are not therefore authorized to disturb them." Besides, these are questions

purely of State practice and involve no Federal matter, and therefore the decision of the State court upon them is conclusive. At most, this Court would only verify the statement of the opinion that the evidence of the defendant in error and the witness Barclay tend to support the findings, which can be done by examining their evidence on pages 44, 53, and 65 of the printed record.

The next two points, that the contract was void for want of consideration and for want of mutuality, are disposed of by the court of appeals of Kentucky in their opinion (pages 71 and 72), and upon principles of general jurisprudence; and their determination in no way involves a Federal question, and therefore they also are not the subject of investigation by this honorable Court. (*Bank of West Tennessee vs. Citizens' Bank*, 14 Wall., 9; *Tarven vs. Keuch*, 15 Wall., 67.)

As these questions were all fully discussed and considered by the two State courts, and were and are peculiarly within their jurisdiction, it seems to be extreme pertinacity to continue their discussion here, even if this Court felt at liberty to disregard all precedent and enter upon a review of them.

Leaving the points relied on by plaintiff in error in the trial court for the present, I wish to call the attention of the Court to one of the points relied on by counsel in his amended or supplemental brief (see page 3, at the top) why the court of appeals should have reversed the case and given plaintiff in error a new trial. In the brief counsel uses this language: "In addition to them, the further question was made in the court of appeals whether the trial court could, on its own motion and over the stated objections of the defendant, set aside a judgment entered in pursuance of a verdict of the jury for $4,416.00, and in lieu thereof substitute another judgment for $4,032.00, on the ground that the jury had erred in the assessment of the amount of recovery." The honorable counsel has here unintentionally made a misstatement of fact. The plaintiff in error did not complain in the assignment of errors in the court of appeals that the

judgment of $4,416.00 was entered in pursuance of the verdict of the jury, and that the court substituted the judgment for $4,032.00 because the jury had erred in the assessment of the amount of recovery. He really complained that the court had entered any judgment, upon the ground "the jury by its verdict failed to assess the amount of recovery" (see error 8, page 67 of the record), and after this had been done he complained that this judgment was set aside by the court on its own motion and the other substituted. His real complaint was that the court fixed the amount of recovery upon the general verdict, "We, the jury, find for plaintiff," and this is the only error complained of by plaintiff in error upon this subject in his assignment of error filed in this Court. (See page 3, error nine, of the record.)

If it was not wrong for the court to fix the amount of recovery upon the verdict returned it certainly could not be a prejudicial error for the court to reduce the amount in favor of the party complaining; but whether the court should have assessed the amount of recovery, and whether and how it could correct or amend its own assessment are questions purely of local practice, depending upon the local law, and the court of appeals in its opinion (page 71) has met and answered all these objections; and that it did so according to law we might cite other decisions of the same court to show that such verdicts have always been regarded as sufficient to authorize a judgment by the court, and that when a mistake has been made in the assessment, either by the jury or the court, the court may afterwards, *sua sponte*, correct it, and that when a finding is informal or defective the party complaining should move to refer it back to the jury for correction; but if what we have said in regard to the effect to be given to the decisions of the State courts upon matters of this kind is correct, then this Court will not undertake to revise this point.

Reverting to the points made in the court below, the fifth objection of the plaintiff in error, as stated in his supple-

mental brief, is that the contract was not within the scope of the cashier's powers, and therefore, if made, not binding on the bank. In his assignment of errors the plaintiff in error uses this language: "Said judgment of said court of appeals is erroneous, because it holds and decides, to the great prejudice of the plaintiff in error, which is a banking corporation organized and existing under said act of Congress, that the alleged contract or agreement sued on in the said Logan circuit court by said defendant in error was within the scope of the power and authority of the cashier of said plaintiff in error; that said cashier was empowered, by virtue of his office as cashier of said national bank, to bind the plaintiff in error by the making of said alleged contract or agreement with the defendant in error."

Again, we have carefully examined the judgment and opinion of the court of appeals as contained in the record, and have been unable to notice where or how the court, either directly or impliedly, adjudged as the error assigned declares. But omitting that matter now, as conceded by the counsel for plaintiff in error in his discussion of this question, beginning on page 6 of his original brief, "this proposition is confessedly debatable ground," and it certainly is true that nothing can be found in the national-bank act defining the powers and duties of a cashier, and, as shown by his brief, the counsel is bound to rely in support of what he says on general principles of jurisprudence and on the opinions of courts, which are seldom easily harmonized and often positively conflicting. Mr. Morawetz, in his Treatise on Private Corporations, vol. 2, sec. 608, concludes a discussion of this subject with this statement:

"It is obviously impossible to state any precise rule by which a line can be drawn in every case between such acts as are sufficiently unusual to put persons dealing with an agent upon inquiry and such acts as may be presumed to be within the agent's authority. Each case must be considered in view of its own peculiar facts and circumstances."

It is also said in Pratt's Digest of the National Bank Act, page 10, "it is doubtful whether national banks have a right to deal in stocks and bonds or to act as an agent for the negotiation of stocks and bonds. It is probable that the courts in deciding any point as to the powers of national banks, when the exercise of a power is not clearly granted, will be guided very much by the custom of banks. Every one is aware that business methods change from time to time, and that new methods for accomplishing similar ends are constantly being devised. Banks are intended to meet the wants of business communities, and to do so must be swayed by business customs. The courts in banking matters have made custom a very important element in reaching their decisions, and they will, doubtless, continue to do so."

I have quoted these passages not because I regard them as authority, but because they express better than I could what seems to be the basic principle governing decisions upon this subject.

But as it was not necessary, neither the trial court nor the court of appeals attempted to hold in the decision of this case that the cashier of plaintiff in error had the power to make this contract. The idea maintained by the court is that this question was settled by the jury, who determined as a fact submitted to them that the contract was made by the bank, and the plaintiff in error, having adopted and ratified the act of its agent and received the benefits of this transaction, is now estopped to deny his authority.

However, this is another question of general jurisprudence which depends in no degree on any particular clause of the bank act and is not in any sense a Federal question; and if it were, this is one of the cases in which the question of agency is unimportant unless the plaintiff in error can avail itself of its plea of *ultra vires*.

So that, in fact, in all these errors complained of and the arguments of counsel, the questions pertaining to or growing

out of the claim made by plaintiff, that the contract is not within the power of the corporation and, therefore, that no action can be maintained upon it and no recovery had for its violation, are the only ones for the consideration of the Court.

To this subject I propose to devote the remainder of this brief.

In the third error assigned by plaintiff in error it is claimed that the motion of plaintiff in error in the trial court for a peremptory instruction to the jury to find for the plaintiff ought to have been sustained, because the plaintiff in error, being a banking corporation, was forbidden by said national bank act to enter into or make any such contract.

In the seventh error assigned it is claimed that it was error to sustain the defendant in error's demurrer to the fifth paragraph of the plaintiff in error's answer, which paragraph avers that the bank had no power to make the contract sued on.

In the second error assigned the plaintiff complains that the demurrer to the petition ought to have been sustained on the ground that the cause of action was founded on a contract forbidden by the terms and provisions of the charter of plaintiff in error.

In several errors it is complained that the court refused to instruct the jury in accordance with this idea. We shall not pay any further attention to the complaint in regard to these instructions, as it is evident that they must stand or fall with the other errors assigned.

In order that the court may understand fully the nature of this defense, I take leave to copy here the petition of the plaintiff filed in the court below:

"LOGAN CIRCUIT COURT.

"*Petition Ordinary.*

"R. P. TOWNSEND, *Plaintiff,*
vs.
"THE LOGAN COUNTY NATIONAL BANK, *Defendant.*

"The plaintiff, R. P. Townsend, states that on the — day of June, 1879, he sold to the defendant, The Logan County National Bank, twelve thousand and eight hundred dollars ($12,800.00) of the bonds of Logan county issued in aid of the Owensboro' and Russellville railroad, with six months' accrued interest thereon, for the consideration of 68½c. on the dollar and the further consideration hereinafter named, to wit; that said bonds were sold to the defendant at its special instance and request and upon the promise and agreement of defendant made to plaintiff that defendant would replace the bonds to plaintiff at 68½c. on the dollar or less upon the demand of plaintiff, and that as evidence of said promise and agreement he files herewith a writing signed by Hugh Barclay, Jr., the then cashier of defendant. Said writing is made an exhibit and marked 'Bond;' and plaintiff states that, relying upon said promise and agreement of defendant to replace said bonds at 68½ cents or less upon demand, and which was part of the consideration, he sold to defendant the bonds before described, and that defendant, in violation of its said promise and agreement, has failed and refused and still refuses to comply therewith, although requested and demanded to do so. Plaintiff states that said bonds are now worth and were at the time of demand made by plaintiff dollar for dollar or par, without accrued interest.

"That the defendant is an incorporated institution doing business in the town of Russellville, Ky., under and by virtue of the laws of the United States, with powers to contract and be contracted with, sue and be sued; that by reason of the failure and refusal of the defendant to comply with its said promise and agreement this plaintiff has been damaged in the sum of four thousand and thirty-two dollars, the difference between the price paid for said bonds by defendant (68½ cents) and their value now, dollar for dollar, and three hundred and eighty-four dollars, the amount of six months'

accrued interest, and aggregating the sum of four thousand four hundred and sixteen dollars ($4,416.00).

"Wherefore plaintiff prays judgment for damages against the defendant for the sum of four thousand four hundred and sixteen dollars ($4,416.00), for his costs, and for all proper relief.

"R. P. TOWNSEND,
"By JOHN S. RHEA and
"JOHN W. MALONE, *Attorneys.*"

The fifth paragraph of the answer, to which the demurrer was sustained, was in the following words:

"Paragraph 5th. Defendant says that said Barclay had no authority, right, or power to make for and on account of defendant the contract set out by plaintiff in his petition, and that defendant had no right, power, or authority to make it; that, as stated, it was a mere gambling transaction, a mere dealing in and betting upon the future value of said bonds, and was not authorized by defendant's charter or by law."

It will be observed that the plaintiff in error by his demurrer admitted and in this paragraph failed to deny the allegations of the petition, and that all these allegations are found to be true by the special and general verdicts of the jury. In discussing the questions presented, it must therefore be assumed that the facts stated in the petition are the exact facts of this case so far as they go.

In the threshold of this discussion it is again necessary to remind the Court that the court of appeals is wrongfully charged by the plaintiff in error in his eighth assigned error with having declared, affirmed, and adjudged that the plaintiff in error, a national banking corporation, organized under the "national bank act," had the power under the said charter to traffic and deal in county subsidy bonds.

We are very sure that the court of appeals and the circuit court attempted to declare, affirm, or adjudge no such doctrine.

Since the adoption of the act of 1867 it has been "the settled course of decision for the Supreme Court to examine

the opinions of the State courts delivered in writing and recorded in obedience to the requirements of law to ascertain the ground of the judgment of the State court. This was distinctly announced by this Court in the case of *Kreiger vs. Shelby Railroad Co.*, 125 U. S., 44, which was a writ of error to the court of appeals of Kentucky, and numerous authorities cited in support of it. If, then, we turn to the opinion of the court of appeals in this cause (see page 72 of the printed record), we find that the court of appeals uses the following language in discussing this question:

"3. The last ground is that the contract is *ultra vires* the corporate authority of the bank in direct violation of its charter, and consequently is no such an obligation as will charge the bank or make it to any extent, either in law or conscience, liable in damages or otherwise for breach of the conditions.

"It seems to us that if the proposition be conceded it would not avail appellant, for if it had no authority under its charter to purchase the bonds it cannot in justice and conscience refuse to abide by the judgment of the court in this case, which involves nothing more than the return of the bonds and receipt of what it paid for them. To do less cannot be justified without permitting it to profit by its own wrong in violating the law of Congress under which it exists.

"*Probably, according to a fair construction of the 'national bank act,' the power is not expressly given to appellant to purchase and deal in bonds of the character in question;* but neither is it expressly prohibited by the act to do so, and there is a proper and well-recognized difference between 'the case of an engagement made by a corporation to do an act expressly prohibited by its charter or some other law and a case where legislative power to do the act has not been granted.' (See *Hitchcock vs. Galveston*, 6 Otto, 341, and numerous cases there cited.)

"In that case the following from the *State Board of Agriculture vs. The Citizens' Street Railway Company*, 47 Indiana, 497, was quoted with approval: Although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter or of any statute prohibiting it and the corporation has by its

promise induced a party, relying on the promise and in execution of the contract, to expend money and perform his part thereof the corporation is liable on the contract.

"If the special findings of the jury in this case be taken as true, then it needs no argument to show that the rule thus laid down applies to the contract we are considering, and to adopt the opposite of that rule would invite a disregard of the provisions of the national bank act as well as fraud and bad faith toward those dealing with a corporation existing under it."

We have thus quoted at length from this opinion because the counsel for the plaintiff in error seems to be laboring under the impression that this judgment could only be supported upon the idea that the original contract was perfectly legitimate and clearly within the powers conferred upon the bank by the express terms of the "national bank act," or, in other words, that if as an original proposition it could not be maintained that there was direct authority in the act for the making of this contract, and it was in no sense at any time subject to the charge that it was *ultra vires*, and he has therefore assumed in his assignment of errors and in his argument that the courts below have decided that this contract was not *ultra vires*.

Our contention is—and in this we think we are following the opinion of the court of appeals of Kentucky—that there are many cases, and that this is one of them, in which it may be true that the contract is *ultra vires*, and yet the contract will be enforced. We understand that when a contract is expressly prohibited by statute or when it is tainted with any inherent vice, or, for any other reason known to the common law, should not be enforced as against public policy, the courts would not attempt to enforce it, whether the plea appeared in the shape of an *ultra vires* plea or not; but when the only objection to a contract is the naked fact that the power to make it has not been expressly granted, and the contract would be perfectly good as between individuals, or those not affected by the statute, the courts will not allow

either party to the contract to avail himself of this defense, where it would work a manifest wrong, especially if the other party has, in good faith, performed his part of the contract, or any part of it, and is ready to perform the remainder. We think that this honorable Court has gone further than this and denied the right of a party to put up this plea, even though no part of the contract may have been executed; but, as these decisions were actually based upon states of fact where part of the contract had been performed, we shall only insist on the application of the doctrine to that extent, especially since the limitation fixed is amply sufficient to maintain the judgment complained of by the plaintiff in error in this case.

In the case of the *National Bank vs. Matthews*, 98 U. S., page 621, the facts were that on the 1st of March, 1871, Hugh B. Logan and Elizabeth A. Matthews executed and delivered their joint and several promissory note for the sum of fifteen thousand dollars to Sterling, Price & Co., payable to the order of that firm two years from date, with interest at the rate of 10 per cent. per annum. The payment of the note was secured by a deed of trust, executed by her, of certain real estate therein described, situate in the State of Missouri.

On the 13th of the same month the note and deed of trust were assigned to the Union National Bank of St. Louis. Price & Co. failed to pay the loan at maturity. The bank directed the trustee named in the deed of trust to sell. Said Elizabeth thereupon filed this suit in the proper court of Missouri to enjoin the sale. The bank, in its answer, averred that "it accepted the said note and deed of trust as security for the sum of $15,000, then and there advanced and loaned to the said Price & Co., on the security of said note and deed of trust." A perpetual injunction was decreed, upon the ground that the loan by the bank to Price & Co., was made upon real-estate security, which was forbidden by law, and that the deed of trust was therefore void. The decree

was made upon the pleadings. No testimony was introduced upon either side. The bank removed the case to the supreme court of the State, where the decree was affirmed. The bank then sued out this writ of error.

The case was argued before this Court elaborately by distinguished counsel on both sides, and numerous authorities cited, after which the opinion of the Court was delivered by Mr. Justice Swayne.

In the beginning it was admitted by the Court that the transaction was by clear implication prohibited by the "national-bank act," a proposition which is not so evident in the case at bar, and that the facts relied on for the defense were true.

The Court then undertook to explain why the restrictions had been placed on the power of banks. "It was to keep the capital of the banks flowing in the daily channels of commerce, to deter them from embarking in hazardous real-estate speculations, and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain."

The first point made by the court was that in this case, the title by mortgage or conveyance was not taken directly to the bank, and that the fact that the title or security might inure indirectly to the benefit of the bank did not bring the transaction within the class of cases where powers not delegated had been exercised, and cited in support of this proposition the case of *The First National Bank vs. Haire*, 36 Iowa, 443. But the Court admitted that the Supreme court of Missouri had decided that the loan was made upon real-estate security, within the meaning of the statute, and that their judgment had been based upon that view, and then proceeded.

"But, conceding them to be as claimed, the consequences insisted upon by no means follow necessarily. The statute does not declare such a security void. It is silent upon the subject. If Congress so meant it would have been easy to say

so, and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. When usurious interest is contracted for a forfeiture is prescribed and explicity defined."

The Court proceeds to illustrate this position by citing and commenting on a number of decisions, and concludes that "where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, *and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose.* (*Leazure vs. Hillegas*, 7 Serg. & R. (Pa.), 313; *Goundie vs. Northampton Water Co.*, 7 Pa. St., 233; *Bunyea vs. Costin*, 14 Pet., 122; *The Bank vs. Poiticeux*, 3 Run. (Va.), 136; *McIndoc vs. St. Louis*, 10 Mo., 577. See also *Gold Mining Company vs. National Bank*, 96 U. S., 640.)

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"We cannot believe it was meant that stockholders and, perhaps, depositors and other creditors should be punished and the borrower rewarded by giving success to this defense, whenever the offensive fact shall occur. *The impending danger of ouster and dissolution was, we think, the check, and none other, contemplated by Congress.*"

Subsequently, in the case of *Jones vs. Guaranty and Indemnity Co.*, 101st U. S., 628, this Court approved the foregoing decision, and said:

"If the one (mortgage) here in question be *ultra vires*, no one can take advantage of the defect of power but the State. As to all other parties, it must be held valid and may be enforced accordingly."

It will be observed by the court that in this case the point was also made that there was a technical defect touching the execution of the mortgage; but the Court said this had been cured by acquiescence and ratification. And, while on this point, we ask the indulgence of the Court if we go back to

the objection raised by counsel for the plaintiff in error, that the cashier had no power to make this contract. We overlooked, when writing of this subject in the first part of this brief, the case of *People's Bank vs. National Bank*, 101 U. S., 183, where this Court uses the following language:

"All the parties engaged in the transaction and the privies were agents of the defendant. If there were any defect of authority on their part, the retention and enjoyment of the proceeds of the transaction by their principal constituted an acquiescence as effectual as would have been the most formal authorization in advance or the most formal ratification afterwards. These facts conclude the defendant from resisting the demand of the plaintiff. (Wharton Agency, sec. 89; Bigelow Estoppel, 423; *Railroad Co. vs. Howard*, 7 Wall., 392; *Kelsey vs. National Bank*, 69 Pa. St., 426; *Steamboat Co. vs. McCutchen & Collins*, 13 *Idem*, 13.) A different result would be a reproach to our jurisprudence."

Reverting to the question of *ultra vires*, the Court will have noticed that, though in the two cases cited from this Court, *supra*, the Court is clear in the enunciation of the general principle that the simple question of *ultra vires* can only be taken advantage of by the State or sovereign in a direct proceeding against the corporation, yet the facts of both cases, as before stated, show that the contract had been executed on the part of the party against whom the plea was offered. Now, though it must be admitted that, in many cases and courts, the plea has not been allowed where the contract remains wholly unexecuted, this doctrine of the Supreme Court is followed almost everywhere in the class of cases in which the defendant has received the benefit of the contract and seeks to keep what he has thus obtained, without consideration, under this plea.

In *Silver Lake Bank vs. North*, 4 Johns (N. Y.) Chancery, 370, the bank was a Pennsylvania corporation and had taken a mortgage upon real estate in New York, where a bill of

foreclosure was filed. The defense was *ultra vires*. Chancellor Kent delivered the opinion of the court, and said:

"Perhaps it would be sufficient for this case that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments, and if they should pass the exact line of their power it would rather belong to the government of Pennsylvania to exact a forfeiture of their charter than for this court, in this collateral way, to decide a question of misuser by setting aside a just and *bona fide* contract."

Mr. Sedgwick, in his work on "Statutory and Constitutional Construction," page 73, says:

"When it is a simple question of authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded upon it, to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract the benefit of which he retains."

This Court announced this doctrine most distinctly and emphatically, also, in the case of the *Railway Company vs. McCarthy*, 96 U. S., 367.

That there is a proper and well-recognized distinction between that class of cases where the act is directly prohibited or is inherently vicious, and a case where legislative power has not been granted, is settled in the case of *Hitchcock vs. Galveston*, 6 Otto, 341, where the court held that although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter nor of any statute, and the corporation has by its promise induced a party, relying on the promise and in execution of the contract, to expend money and perform his part thereof, the corporation will be held by it.

In the case last cited, the court quotes with approbation from the *State Board of Agriculture vs. Citizens' Street Railway Co.*, 47 Ind., 497, as follows:

"Although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract."

The opinion in the foregoing case was delivered by Mr. Justice Strong, and we especially direct the attention of the Court to it as decisive.

In *Casey vs. Credit Mobilier*, 2 Woods, 32, Judge Woods, of the United States circuit court, says:

"A corporation which has received the benefit of a loan cannot avoid liability on a mortgage to secure its payment by denying the authority of those who contracted the loan on its behalf.

"It is claimed, lastly, by the complainant that the contract between the banking association and the society was not legitimate banking and could not be lawfully carried out. We are not cited to any clause in the national currency act forbidding such a contract and can see no reason why the association might not lawfully make it. But conceding that the currency act, which is the charter of the association, did not authorize such a contract, it does not follow that the association can repudiate the contract and keep its fruits. Corporations have no right to violate their charters, but they have capacity to do so, and to be bound by their acts, when a repudiation of such acts would result in manifest wrong to innocent parties."

In support of the doctrine announced the court cited *Bissell vs. Railroad Co.*, 22 N. Y., 258, and *Bank vs. Dandridge*, 12 Wheaton, 70.

In the case of *Bushnell vs. Chautauqua County Nat. Bank*, 1st Nat. Bank Cases, 796, the court says:

"But assuming that the undertaking of the bank was *ultra vires*, yet, as it was not alleged, we think the defendant is estopped from setting up that defense. * * * The agreement has been fully executed on the part of the plaintiff by his entering into the proposed obligation to Shaw.

It would be a fraud upon him to release the defendant from its part of the agreement, and the bank is therefore estopped from setting up a mere want of power."

In *Germantown Nat. Bank vs. Meadowcroft*, 2 Nat. Bank Cases, 462, the supreme court of Illinois said:

"The question is not whether the bank was acting under and in conformity to the provisions of its charter in receiving and forwarding grain, but whether the bank has wrongfully converted appellant's property to its own use. If, as the jury have found, the bank has, then it does not matter whether the wrong was perpetrated while the bank was in pursuit of its legitimate business or was acting against the provisions of its charter. The wrong to appellee is the same in one case as the other. It can be no defense to say the bank obtained and converted appellee's property contrary to the provisions of its charter. The wrong is the same, and it cannot matter in what manner the wrong was perpetrated, as the liability is the same. It is the wrong, and not the manner in which it occurred, we have to consider. It is not a defense for the bank to say we received and converted the grain and held the money without claim of right, but as, when we converted the property, we were acting beyond the limits of our charter you cannot recover. The bank committed the wrong and is liable."

It is not my habit to quote from text books in making an argument before a court, because they are only unauthorized commentaries upon what the courts have decided, and it is better usually to quote the original decisions themselves. But Mr. Morawitz, in his recent excellent treatise on "Private Corporations," has shown a strong tendency to maintain the doctrine of *ultra vires* in its fullest possible extent, and yet he has stated the principle for which I am here contending so aptly and clearly and forcibly that I cannot refrain from a lengthy quotation from him.

As a caption to the 689th section of his work he formulates this rule:

"AFTER A CONTRACT ENTERED INTO BY A CORPORATION HAS BEEN PERFORMED BY EITHER OF THE CONTRACTING PARTIES,

THE FACT THAT THE MAKING OF THE CONTRACT INVOLVED AN UNAUTHORIZED EXERCISE OF CORPORATE POWER ON THE PART OF THE COMPANY WILL NOT CONSTITUTE A DEFENSE TO AN ACTION BROUGHT BY THE PARTY HAVING PERFORMED THE CONTRACT TO RECOVER COMPENSATION FOR A BREACH OF THE CONTRACT BY THE OTHER PARTY."

Then, in amplification of this proposition, he says:

"The common-law prohibition against the unauthorized exercise of corporate powers is founded upon general grounds of public policy, and the legal effect of this prohibition depends upon the requirements of public policy. If a corporation departs from its chartered purposes, in violation of the common-law prohibition, it may be punished by forfeiture of its franchises at the suit of the State. If a contract is made by a corporation in excess of its chartered powers either party to the contract may withdraw as long as a rescission can be effected without injustice. But after a contract of this character has been performed by either party the requirements of public policy can best be satisfied by compelling to make compensation for a failure to perform the agreement on his side. The authorities bearing on this doctrine are conflicting and the principles which underlie it have frequently been mistaken and misunderstood. It is desirable, therefore, to point out the exact scope and meaning of the rule above stated before referring in detail to the cases in which it has been applied."

He then goes on to explain that the rule does not apply to cases where the corporation cannot be charged according to the established laws of agency, and reiterates that the rule relates solely to cases where the contract is in excess of the corporate powers on account of the common-law prohibition against the exercise of powers not granted by express statutory provision, and adds: "It has no application to contracts which are illegal, because expressly prohibited by the Statute, or because of some general principle of the common law, irrespective of the provision against unauthorized corporate action. If a contract is prohibited by statute, the proper construction of the statute must be considered, and if

it is in violation of some general principle of the common law, or of public policy, the general rules of the common law must be applied."

The Court will perceive that this writer will not allow the doctrine to be extended to the length stated by this Court in its decisions heretofore quoted, but confines it to the single case where the power is not expressly granted, and the common-law provision or rule of construction that powers not specifically granted are to be regarded as withheld comes in to prevent the exercise of the power.

Now, in the case at bar, whatever may be the contention of the counsel for plaintiff in error, the contract sued on is nowhere expressly condemned by the "national-bank act." All that can be said is that it is not covered by any of the expressly delegated powers, and the conclusion that it is prohibited is reached solely upon the basis of the common-law doctrine; unless, indeed, it is contended that it is vicious as a gambling transaction or a contract without mutuality or consideration. If either of these contentions could, as an original proposition, be maintained, they could not be supported on the ground that there is any prohibition of them in the act, but solely because such contracts are not allowed to prevail in common-law courts of justice when made by anybody in regard to any subject. Therefore these points involve no "Federal question," and, as before stated, have been irrevocably settled against the plaintiff in error by the only tribunal having jurisdiction.

To reduce this case to its final analysis: The act of Congress confers "no title, right, privilege, or immunity" on the plaintiff in error in this cause. All it can truthfully say is that the law has not permitted it, in express terms, to make the contract, and its real claim is that the common law comes in aid of the statute and gives it "immunity" as against its otherwise legitimate contracts. This seems to us to be, at best, a very small Federal question; and when you apply to it the other rule, that this doctrine never applies

where one party has performed his part of the contract, the immunity absolutely vanishes into nothingness; and therefore, although it is barely possible that "the record may show that this Court has jurisdiction, it is manifest that the writ was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument."

But if this were a serious question, the Court will perceive by reading the petition and answer, as hereinbefore quoted, that there is sufficient in them to maintain the judgment on the idea that the plaintiff in error had wrongfully obtained the property of the defendant in error and converted to its own use, and was therefore liable in damages for a failure to restore the property upon demand.

We did not make the motion to dismiss this writ upon the ground indicated in the 6th rule of this Court, quoted *supra*; but we are satisfied that it should have been made, and that this is peculiarly a case in which the second section of rule 23 of this Court should be applied and damages awarded.

We respectfully ask that the judgment of the court below be affirmed, and this writ dismissed with costs and damages.

JOHN FELAND,
Counsel for Defendant in Error.